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1955

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Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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Garvin *v.* Police Authority for City of London	[1944] K.B. 358; 60 T.L.R. 207; [1944] 1 All E.R. 378	*C.*	380, 402
Gawler *v.* Chaplin	2 Exch. 503	*R.*	11, 12
Geach *v.* Ingall	14 M. & W. 95	*E.*	417, 426, 427
Gerard *v.* Worth of Paris Ld.	[1936] 2 All E.R. 905	*R.*	401
Gibbon *v.* Payne	22 T.L.R. 54	*Dist.*	299, 321
Gibson *v.* Doeg	2 H. & N. 615	*R.*	320–2, 327
Gilchester Properties Ld. *v.* Gomm	64 T.L.R. 235; [1948] 1 All E.R. 493		528
Gill *v.* Manchester, Sheffield and Lincolnshire Railway Co.	L.R. 8 Q.B. 186		191
Gladstone *v.* Padwick	L.R. 6 Ex. 203	*R.*	10, 11
Glanystwyth, The	[1899] P. 118; 15 T.L.R. 224		280
Glossop *v.* Ashley	[1922] 1 K.B. 1; 37 T.L.R. 827	*R.*	26
Goldstein *v.* Salvation Army Assurance Society	[1917] 2 K.B. 291		421
Goodman *v.* J. Eban Ld.	[1954] 1 Q.B. 550; [1954] 1 All E.R. 763	*Appl.*	218, 222, 225
Gough and Aspatria, Silloth and District Joint Water Board, *In re*	[1904] 1 K.B. 417		617
Grace (G. W.) & Co. Ld. *v.* General Steam Navigation Co. Ld.	[1950] 2 K.B. 383; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201	*Appr.*	69, 74, 90, 91, 98
Greene *v.* West Cheshire Railway Co.	L.R. 13 Eq. 44	*Dist.*	207, 216

There must be judgment for the plaintiff for £300 damages and for £18, the value of the two garments lost.

Judgment for the plaintiff.

Solicitors: *Harold Kenwright & Cox; Wigan & Co.*

J. A. G.

ANSPACH *v.* CHARLTON STEAM SHIPPING CO. LD.

C. A.

1955
Jan. 26,
27, 28.

Denning,
Birkett and
Parker L.JJ.

Landlord and Tenant—Rent restriction—Standard rent—Existing furnished tenancy—Subsequent unfurnished tenancy with benefit of furnished tenancy—Whether standard rent fixed by unfurnished tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*a*) (*as amended*).

In 1940, whilst there was already in existence a furnished letting of a flat at £190 per annum, the owners, K. Co., granted to C.W.B. Co. a five years' lease of the flat, unfurnished, at £115 per annum, with the benefit of the existing furnished tenancy. The two companies were closely associated and had some directors in common. In 1945 the defendant landlords bought the freehold and continued to let the flat furnished until September, 1951, when an unfurnished tenancy of the flat was granted at £275 per annum. There had been no unfurnished letting of the flat before 1940. On an application for the determination of the standard rent:—

Held, (1) that the fact that in 1940 there was a tenant in occupation under a furnished tenancy did not take the flat outside the Rent Restriction Acts and thereby prevent the unfurnished lease from establishing a standard rent.

(2) That the lease of 1940 was not a sham as in *Conqueror Property Trust Ld.* v. *Barnes Corporation* [1944] K.B. 96; 60 T.L.R. 75; [1944] 1 All E.R. 34, and although it might be a transaction of a financial nature between two associated companies it nevertheless fell within section 12 (1) (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

(3) That although C.W.B. Co. might have taken the lease for a business investment and did not intend to occupy the premises themselves, this did not make the letting a letting for business purposes so as to exclude it from the operation of the Acts.

Accordingly the standard rent was £115 per annum.

Prout v. *Hunter* [1924] 2 K.B. 736; 40 T.L.R. 868 considered.

Appeal from a decision of Judge Bensley Wells sitting at Marylebone County Court.

[Reported by G. D. Black, Esq., Barrister-at-Law.]

Horn *v.* Sunderland Corporation	[1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480	*C.*	339, 346
Horner *v.* Horner	1 Hagg.Con. 337	*R.*	488
Household Fire Insurance Co. *v.* Grant	4 Ex.D. 216	*R.*	337
How, *Ex p.*	[1953] 1 W.L.R. 1480; [1953] 2 All E.R. 1562	*R.*	165
Howell *v.* Falmouth Boat Construction Co. Ld.	[1951] A.C. 837; [1951] 2 T.L.R. 151; [1951] 2 All E.R. 278		528
Hughes *v.* Liverpool Victoria Legal Friendly Society	[1916] 2 K.B. 482; 32 T.L.R. 525		529
Hughes *v.* Pump House Hotel Co. Ld.	[1902] 2 K.B. 190; 18 T.L.R. 654	*E.*	584, 588
Humphreys *v.* Polak	[1901] 2 Q.B. 385	*R.*	488, 495
Hyde *v.* Johnson	2 Bing.N.C. 776	*R.*	226
Hyman *v.* Hyman	[1929] A.C. 601; 45 T.L.R. 444	*R.*	517
Hyman *v.* Hyman, Hughes *v.* Hughes	[1929] P. 1; 44 T.L.R. 664		235
Hyman *v.* Van den Bergh	[1908] 1 Ch. 167		116
Imperial Land Co. of Marseilles, *In re* (Harris' case)	L.R. 7 Ch. 587	*R.*	337
Inland Revenue Commissioners *v.* Clay	[1914] 3 K.B. 466		617
Inland Revenue Commissioners *v.* Glasgow and South Western Railway Co.	12 App.Cas. 315	*R.*	346–8
Insall *v.* Nottingham Corporation	[1949] 1 K.B. 261; 64 T.L.R. 617; [1948] 2 All E.R. 232	*R.*	28
Isaacs & Sons *v.* Salbstein	[1916] 2 K.B. 139		586
Joel *v.* Law Union and Crown Insurance Co.	[1908] 2 K.B. 863		423
John Laing & Son Ld. *v.* Kingswood Assessment Committee	[1948] 2 K.B. 116; 64 T.L.R. 407; [1948] 1 All E.R. 943; [1949] 1 K.B. 344; 65 T.L.R. 80; [1949] 1 All E.R. 224	*Appl.*	653, 661, 667–73, 679, 680
John T. Ellis Ld. *v.* Walter T. Hinds	[1947] K.B. 475; 63 T.L.R. 181; [1947] 1 All E.R. 337		424
Johnston Brothers *v.* Saxon Queen	108 L.T. 564	*R.*	80
Johnston *v.* Sumner	3 H. & N. 261		511
Jones and Carter's Arbitration, *In re*	[1922] 2 Ch. 599; 38 T.L.R. 779	*R.*	310
Jones *v.* Bright	5 Bing. 533		372
Jones *v.* Goodchild	2 Eq.Cas.Abr. 425		482
Jones *v.* Guardians of Newton and Llanidloes Union	[1920] 3 K.B. 381; 36 T.L.R. 758		511
Jones *v.* Prothero	[1952] 1 All E.R. 434		110
Jordan *v.* Limmer and Trinidad Lake Asphalt Co. Ld.	[1946] K.B. 356; [1946] 1 All E.R. 527	*R.*	350
Joseph Constantine Steamship Line Ld. *v.* Imperial Smelting Corporation Ld.	[1942] A.C. 154; 57 T.L.R. 485; [1941] 2 All E.R. 165	*R.*	246, 247, 427

K. (an infant), *In re*	[1953] 1 Q.B. 117; [1952] 2 T.L.R. 745; [1952] 2 All E.R. 877	*C.*	286, 296
K., *In re*	[1953] 1 Q.B. 117; [1952] 2 T.L.R. 745; [1952] 2 All E.R. 877		487
Keats *v.* London County Council	[1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303		630
Kennard *v.* Cory Bros. & Co.	[1922] 2 Ch. 1; 38 T.L.R. 489	*R.*	216
Kent and Sussex Sawmills Ld., *In re*	[1947] Ch. 177; 62 T.L.R. 747; [1946] 2 All E.R. 638	*R.*	588
Kenyon *v.* Walker	62 T.L.R. 702; [1946] 2 All E.R. 595	*R.*	363, 365
Kerr, *In re*	24 L.R.Ir. 59	*R.*	488
King *v.* Earl Cadogan	[1915] 3 K.B. 485; [1915] 1 K.B. 821	*C.*	30, 43, 45, 55
Kinloch *v.* Nevile	6 M. & W. 795		116
Knight and the Tabernacle Permanent Building Society, *In re*	[1892] 2 Q.B. 613; 8 T.L.R. 783	*Dist.*	299, 304, 305, 309, 311
Knightsbridge Estates Trust Ld. *v.* Deeley	[1950] 2 K.B. 228; 66 T.L.R. (Pt. 1) 867; [1950] 1 All E.R. 577		24
Krüger & Co. Ld. *v.* Moel Tryvan Ship Co. Ld.	[1907] A.C. 272; 23 T.L.R. 677	*R.*	78
Kuenigl *v.* Donnersmarck	[1955] 2 W.L.R. 82; [1955] 1 All E.R. 46		235
Lancaster Motor Co. (London) *v.* Bremith Ld.	[1941] 1 K.B. 675; 57 T.L.R. 418; [1941] 2 All E.R. 11	*R.*	401
Lane *v.* Newdigate	10 Ves. 192		211
Langford Property Co. Ld. *v.* Batten	[1951] A.C. 223; 66 T.L.R. (Pt. 2) 958; [1950] 2 All E.R. 1079		463
Langford Property Co. *v.* Goldrich	[1949] 1 K.B. 511; [1949] 1 All E.R. 402		463
Lawrence *v.* The King	[1933] A.C. 699; 50 T.L.R. 13		601
Laugher *v.* Pointer	5 B. & C. 547		443
Lee *v.* Dangar, Grant & Co.	[1892] 2 Q.B. 337		6
Leitch *v.* Emmott	[1929] 2 K.B. 236		391
Lemmon *v.* Webb	[1894] 3 Ch. 1; 10 T.L.R. 467	*R.*	435
Lensen Shipping Co. Ld. *v.* Anglo-Soviet Steamship Co.	40 Com.Cas. 320; 52 Ll.L.R. 141	*R.*	82, 91, 105
Letton *v.* Goodden	L.R. 2 Eq. 123	*R.*	214, 215
Levy *v.* Assicurazioni Generali	[1940] A.C. 791; 56 T.L.R. 851; [1940] 3 All E.R. 427		424
Levy's Trusts, *In re*	30 Ch.D. 119		386
Limerick Steamship Co. Ld. *v.* W. H. Stott & Co. Ld.	[1921] 1 K.B. 568	*R.*	98, 105
Lincoln County Council (Parts of Lindsey) *v.* Wallace Holiday Camp Ld.	[1953] 2 Q.B. 178; [1953] 1 All E.R. 1143	*Appr.*	624, 634, 635

Llanelly Railway and Dock Co. *v.* London and North-Western Railway Co.	L.R. 8 Ch. 942; L.R. 7 H.L. 550	*Dist.*	557, 571–3, 575, 576. 579, 580
Llewellyn *v.* Hinson	[1948] 2 K.B. 385; 64 T.L.R. 321; [1948] 2 All E.R. 95	*R.*	360, 362–4
Llewellyn *v.* Turner	126 L.T. 532		511
Lockwood *v.* Lowe	[1954] 2 Q.B. 267; [1954] 1 All E.R. 472		355
London Crystal Window Cleaning Co. Ld. *v.* National Mutual Indemnity Insurance Co. Ld.	[1952] 2 Lloyd's Rep. 360		422
London Graving Dock Co. Ld. *v.* Horton	[1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1		441
London Guarantie Co. *v.* Fearnley	5 App.Cas. 911		424
Lucas and Chesterfield Gas and Water Board, *In re*	[1909] 1 K.B. 16; 24 T.L.R. 858		342
Lucas and Chesterfield Gas and Water Board, *In re*	[1909] 1 K.B. 16; 24 T.L.R. 858	*R.*	622
Lumley *v.* Wagner	1 De G.M. & G. 604	*Appl.*	207, 216
Lumsden *v.* Burnett	[1898] 2 Q.B. 177; 14 T.L.R. 403	*R.*	11
Lumsden *v.* Shipcote Land Co.	[1906] 2 K.B. 433; 22 T.L.R. 559		268
Luxor (Eastbourne) Ld. *v.* Cooper	[1941] A.C. 108, 206; 57 T.L.R. 213; [1941] 1 All E.R. 33		564
Lynne *v.* Moody	2 Strange 851		6
Macmillan & Co. Ld. *v.* Rees	[1946] 1 All E.R. 675; 62 T.L.R. 331	*R.*	25
MacConnell *v.* E. Prill & Co. Ld.	[1916] 2 Ch. 57; 32 T.L.R. 509		384
M'Daid *v.* Trustees of the Clyde Navigation	1946 S.C. 462	*R.*	351, 352
Mahmoud and Ispahani, *In re*	[1921] 2 K.B. 716; 37 T.L.R. 489	*Dist.*	526, 536
Makein, *In re*, Makein *v.* Makein	[1955] Ch. 194; [1955] 1 All E.R. 57		487
Marles *v.* Philip Trant & Sons Ld., Mackinnon, Third Party	[1954] 1 Q.B. 29; [1953] 2 W.L.R. 564; [1953] 1 All E.R. 651		530
Melhuish *v.* Morris	[1938] 4 All E.R. 98	*R.*	403
Merchant Taylors' Company, *In re*	30 Ch.D. 28	*R.*	260
Mersey Docks and Harbour Board *v.* Coggins & Griffith (Liverpool) Ld.	[1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345	*R.*	444
Middlesex County Council *v.* Nathan	[1937] 2 K.B. 272; [1937] 3 All E.R. 283		510
Middleton *v.* Humphries	47 Ir.L.T. 160	*Appl.*	429, 436
Minet *v.* Morgan	L.R. 8 Ch. 361	*R.*	203–5
Minto *v.* Cahill	[1940] I.R. 302	*D.*	120, 125, 126, 130, 138
Mitchell *v.* Barnes	[1950] 1 K.B. 448; 65 T.L.R. 734; [1949] 2 All E.R. 719		24

Mitchell Brothers Ld. *v.* Worksop Union	1 Konst. 181; 21 T.L.R. 156	*R.*	666, 681
Mitchell *v.* Wright	7 F. 568	*Appl.*	286, 295, 297
Moorcock, The	14 P.D. 64		82
Mordaunt *v.* Mordaunt	L.R. 2 P. & M. 109		229
Moore *v.* Palmer	2 T.L.R. 781	*R.*	447
Morelle Ld. *v.* Wakeling	[1955] 2 W.L.R. 672; [1955] 1 All E.R. 708	*R.*	358
Morelle Ld. *v.* Waterworth; Rodnall *v.* Ludbrook	[1955] 1 Q.B. 1; [1954] 2 All E.R. 673	*Appl.*	379, 395–400, 405, 407, 413, 415
Morgan (R. P.) & Co., *In re*	[1915] 1 Ch. 182	*R.*	265, 276
Mortimore *v.* Cragg	3 C.P.D. 216	*R.*	10
Motion *v.* Michaud	8 T.L.R. 253, 447	*Dist.*	558, 582
Mucklow (A. & J.) Ld. *v.* Inland Revenue Commissioners	[1954] Ch. 615; [1954] 2 All E.R. 508	*C.*	380, 403, 404
Murugiah *v.* Jainudeen	[1955] A.C. 145		384
Musgrave *v.* Horner	31 L.T. 632		210
Myers (G. H.) & Co. *v.* Brent Cross Service Co.	[1934] 1 K.B. 46; 103 L.J.K.B. 123	*R.*	374
National Assistance Board *v.* Parkes	[1955] 1 Q.B. 486; [1955] 1 All E.R. 700	*Aff.*	507
National Assistance Board *v.* Prisk	[1954] 1 W.L.R. 443; [1954] 1 All E.R. 400	*R.*	516, 521, 522
National Assistance Board *v.* Wilkinson	[1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255	*E.*	507, 515, 524, 525
Neale *v.* Del Soto	[1945] K.B. 144; 61 T.L.R. 145; [1945] 1 All E.R. 191	*Appl.*	353, 357, 358, 360–3
Newcomb *v.* De Roos	2 E. & E. 271	*D.*	328, 332, 337
Niboyet *v.* Niboyet	4 P.D. 1	*R.*	242
Nicholas *v.* Penny	[1950] 2 K.B. 466; 66 T.L.R. (Pt. 1) 1122; [1950] 2 All E.R. 89	*C.*	380, 402, 403
Nokes *v.* Doncaster Amalgamated Collieries Ld.	[1940] A.C. 1014	*R.*	443
O'Connor *v.* Hume	[1954] 1 W.L.R. 824; [1954] 2 All E.R. 301	*R.*	39, 58
Ogden *v.* Graham	1 B. & S. 773	*R.*	75, 101, 105, 106
O'Hara, *In re*	[1900] 2 I.R. 232		288
Ord *v.* Blackett	9 Mod. 116		485
Ormrod *v.* Crosville Motor Services Ld.	[1953] 1 W.L.R. 1120; [1953] 2 All E.R. 753		443
Oxford Union *v.* Barton	33 L.T. 375		511
Paine *v.* Partrich	Carth. 191; 1 Salk. 12	*R.*	215
Pardy *v.* Pardy	[1939] P. 288; 55 T.L.R. 1037; [1939] 3 All E.R. 799		235
"Pass of Leny," The	54 Ll.L.R. 288	*R.*	74
Pearl Life Assurance Co. *v.* Johnson	[1909] 2 K.B. 288		423
Pêcheries Ostendaises (Soc. Anon.) *v.* Merchants' Marine Insurance Co.	[1928] 1 K.B. 750; 44 T.L.R. 270	*R.*	269, 275

Peebles *v.* Oswaldtwistle U. D. C.	[1897] 1 Q.B. 625; 13 T.L.R. 297	*R.*	127
Performing Right Society Ld. *v.* London Theatre of Varieties Ld.	[1924] A.C. 1		586
Pelley *v.* Woodbridge U. D. C.	(1951, unreported)		209
Peter *v.* Kendal	6 B. & C. 703	*R.*	215
Piedmont, etc., Life Insurance Co. *v.* Ewing, etc.	92 U.S. 377		424
Place *v.* Searle	[1932] 2 K.B. 497; 48 T.L.R. 428		230
Pointe Gourde Quarrying and Transport Co. Ld. *v.* Sub-Intendent of Crown Lands	[1947] A.C. 565; 63 T.L.R. 486	*C.*	613, 620, 622
Police Authority for Huddersfield *v.* Watson	[1947] K.B. 842; 63 T.L.R. 415; [1947] 2 All E.R. 193	*C.*	380, 402
Portsmouth Steamship Co. Ld. *v.* Liverpool and Glasgow Salvage Association	34 Ll.L.R. 459	*R.*	90
Powell Duffryn Steam Coal Co. *v.* Taff Vale Railway Co.	L.R. 9 Ch. 331	*Appl.*	207, 216
Practice Note (Justices' Clerks)	[1953] 1 W.L.R. 1416	*R.*	164
Price *v.* Price	[1951] P. 413; [1951] 2 All E.R. 580n.	*R.*	516
Prince Blücher, *In re*, *ex p.* Debtor	[1931] 2 Ch. 70; 47 T.L.R. 19		221, 224
Property Holding Co. Ld. *v.* Clark	[1948] 1 K.B. 630; [1948] 1 All E.R. 165; 64 T.L.R. 76	*R.*	45
Proudfoot *v.* Hart	25 Q.B.D. 42		61
Prout *v.* Hunter	[1924] 2 K.B. 736; 40 T.L.R. 868	*C.*	21, 26, 27
Purcell, *In re*	13 L.R.Ir. 489	*N.F.*	1, 18
R. & P. Properties Ld. *v.* Baldwin	[1939] 1 K.B. 461; [1938] 4 All E.R. 845	*R.*	467
Randall *v.* Newsom	2 Q.B.D. 102		372
Rathmines and Rathgar Improvement Commissioners and Field, *In re*	[1922] 1 I.R. 13	*R.*	270
Reader *v.* South Eastern and Chatham Railway Co.	38 T.L.R. 14	*C.*	178, 192
Reardon Smith Line Ld. *v.* Australian Wheat Board	[1954] 2 Lloyd's Rep. 148	*N.F.*	69, 74, 75, 78, 90–2, 97, 98, 106
Reed *v.* Harrison	2 W.Bl. 1218	*R.*	18
Reg. *v.* Barnardo. Jones's Case	[1891] 1 Q.B. 194		482
Reg. *v.* Bates and Pugh	3 Cox C.C. 201	*R.*	596, 599
Reg. *v.* Brighton Inhabitants	1 B. & S. 447	*R.*	495
Reg. *v.* Burrows	11 Cox C.C. 258		591
Reg. *v.* Chafin	3 Salk. 66		482
Reg. *v.* Cowper	24 Q.B.D. 60, 533; 6 T.L.R. 179	*R.*	224, 225
Reg. *v.* Eastern Archipelago Co.	1 E. & B. 310	*R.*	215
Reg. *v.* Fordham	5 T.L.R. 27		511
Reg. *v.* Giles	Leigh & C. 502; 10 Cox C.C. 44		591
Reg. *v.* Gordon	23 Q.B.D. 354; 5 T.L.R. 466	*R.*	595, 597
Reg. *v.* Kent Justices	L.R. 8 Q.B. 305	*Appl.*	218, 223–6
Reg. *v.* Jennison	Leigh & C. 157	*R.*	596
Reg. *v.* Johnston	2 Mood.C.C. 254	*R.*	597
Reg. *v.* Jones	6 Cox C.C. 467	*D.*	590, 598

Reg. *v.* Lee	Leigh & C. 309		591
Reg. *v.* Minister of Agriculture and Fisheries, *Ex p.* Graham	[1955] 2 Q.B. 140		146
Reg. *v.* Nash	10 Q.B.D. 454		485
Reg. *v.* St. Pancras Assessment Committee	2 Q.B.D. 581	*R.*	663, 681
Reg. *v.* Summers	36 Cr.App.R. 14; [1952] 1 All E.R. 1059	*E.*	600, 603
Reg. *v.* Trustees of Oxford and Witney Turnpike Roads	12 Ad. & E. 427	*R.*	216
Reg. *v.* Westminster Unions Assessment Committee	[1917] 1 K.B. 832		389
Reg. *v.* Woodman	14 Cox C.C. 179		591
Regor Estates Ld. *v.* Wright	[1951] 1 K.B. 689; [1951] 1 All E.R. 219; [1951] 1 T.L.R. 242	*Dist.*	30, 40, 45
Remmington *v.* Larchin	[1921] 3 K.B. 404; 37 T.L.R. 839		35
Rex *v.* Aves	34 Cr.App.R. 159; [1950] 2 All E.R. 330		601
Rex *v.* Bancroft	3 Cr.App.R. 16; 26 T.L.R. 10	*R.*	598
Rex *v.* Barnet (and Area) Rent Tribunal, *Ex p.* Millman	[1950] 2 K.B. 506; [1950] 2 All E.R. 216		35
Rex *v.* Biggin	[1920] 1 K.B. 213; 36 T.L.R. 17; 14 Cr.App.R. 87	*E.*	469, 475
Rex *v.* Birmingham (West) Rent Tribunal, *Ex p.* Edgbaston Investment Trust Ld.	[1951] 2 K.B. 54; [1951] 1 All E.R. 198		35
Rex *v.* Cohen and Bateman	2 Cr.App.R. 197	*Appl.*	497, 504, 505
Rex *v.* Flintan	1 B. & Ad. 227		511
Rex *v.* Fulham, Hammersmith and Kensington Rent Tribunal, *Ex p.* Philippe	[1950] 2 All E.R. 211		35
Rex *v.* Garth	[1949] W.N. 170; 33 Cr. App. R. 100; [1949] 1 All E.R. 773		601
Rex *v.* Goodhall	Russ. & R. 461	*R.*	595
Rex *v.* Grout	3 Cr.App.R. 64		472
Rex *v.* Hudson	[1912] 2 K.B. 464; 28 T.L.R. 459	*R.*	474
Rex *v.* Jones	3 Cr.App.R. 67, 68		472
Rex *v.* Jones	39 T.L.R. 457; 17 Cr.App.R. 117	*F.*	469, 477
Rex *v.* Jones	33 Cr.App.R. 11	*D.*	590, 593
Rex *v.* Kritz	[1950] 1 K.B. 82; 65 T.L.R. 505; [1949] 2 All E.R. 406	*Appl.*	600, 603
Rex *v.* Norfolk County Council	60 L.J.Q.B. 379		388
Rex *v.* Northumberland Compensation Appeal Tribunal, *Ex p.* Shaw	[1951] 1 K.B. 711; [1951] 1 T.L.R. 270; [1951] 1 All E.R. 268; [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122		383
Rex *v.* Power	[1919] 1 K.B. 572; 35 T.L.R. 283	*E.*	497, 503–5

Rex *v.* Preston	[1909] 1 K.B. 568; 25 T.L.R. 280; 2 Cr.App.R. 24	*R.*	477
Rex *v.* Rouse	[1904] 1 K.B. 184; 20 T.L.R. 68	*R.*	478
Rex *v.* Schama and Abramovitch	11 Cr.App.R. 45; 31 T.L.R. 88	*E.*	600, 602
Rex *v.* Sidmouth Rent Tribunal	[1951] 1 K.B. 778; [1951] 1 T.L.R. 408; [1951] 1 All E.R. 107	*Q.*	461, 466
Rex *v.* Soper	5 Term R. 278		488
Rex *v.* Turner	[1944] K.B. 463; [1944] 1 All E.R. 599; 60 T.L.R. 332; 30 Cr.App. R. 9		471
Rex *v.* Westfall	28 T.L.R. 297; 7 Cr.App.R. 176		471
Rex *v.* Wright	5 Cr.App.R. 131	*R.*	476, 477
Rhodes *v.* Robinson	3 Bing.N.C. 677		221
Richards *v.* Fry	7 Ad. & E. 698		116
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STATUTES JUDICIALLY CONSIDERED

1225

Magna Carta, 1225 (9 *Hen.* 3, *c.* 36) - **C.A. 379**

1279

Statute de Religiosis Viris, 1279 (7 *Edw.* 1) C.A. 379

1735

Charitable Uses Act, 1735 (9 *Geo.* 2, *c.* 36) C.A. 379

1832

Prescription Act, 1832 (2 *&* 3 *Will.* 4, *c.* 71), *ss.* 2, 4 - - - - - **C.A. 112**

1861

Offences against the Person Act, 1861 (24 *&* 25 *Vict. c.* 100), *s.* 27 - **Divl.Ct. 286**

1875

Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 56, 64 - - - **C.A. 448**

1888

Mortmain and Charitable Uses Act, 1888 (51 *&* 52 *Vict. c.* 42), *ss.* 1 (1) (2), 10 **C.A. 379**

1891

Mortmain and Charitable Uses Act, 1891 (54 *&* 55 *Vict. c.* 73), *s.* 3 - **C.A. 379**

1893

Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14 (1) - - - **C.A. 366**

1894

Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 742 - - **Divl.Ct. 277**

1898

Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1 (*f*) (ii) - - **C.C.A. 469**

1913

Pilotage Act, 1913 (2 *&* 3 *Geo.* 5, *c.* 31), *s.* 11 (1) (2) (4) - - - **Divl.Ct. 277**

1919

Acquisition of Land (Assessment of Compensation) Act, 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 2, *rr.* (1), (2), (3). **C.A. 612**

—— —— *s.* 2, *r.* (6) - - - **C.A. 338**

1920

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*a*) (*as amended*) - - - - **C.A. 21**

—— —— *s.* 12 (2) - - - - **C.A. 353**

—— —— *s.* 14 (1) - - - - **C.A. 120**

1925

Land Registration Act, 1925 (15 *Geo.* 5, *c.* 21), *ss.* 23 (1), 80, 144 (1) - **C.A. 379**

1930

Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 22 - - - - **Divl.Ct. 107**

1933

Children and Young Persons Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 12), *s.* 1 - **Divl.Ct. 286**

1934

County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 105 - - - **C.A. 298**

Law Reform (Miscellaneous Provisions) Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 (1). **C.A. 120**

1939

Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 7 (2) (3) **C.A. 461**

Trading with the Enemy Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *ss.* 1, 7 - **Sellers J. 227**

1945

Water Act, 1945 (8 *&* 9 *Geo.* 6, *c.* 42), *Sch.* 3, *s.* 46 - - - - - **C.A. 448**

1947

Agriculture Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 48), *ss.* 12, 17 (1) (2), 74 (4), 104 (1) (4) (5) - - **Divl.Ct. and C.A. 140**

Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 23, 24, 75. **C.A. 623**

1948

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—— —— *s.* 24 (2) (*d*) - - **C.A. 298**

—— —— *s.* 77 (1), *Sch. VI*, *para.* 24 **C.A. 298**

Agriculture (Scotland) Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 45), *s.* 80 (5). **Divl.Ct. and C.A. 140**

Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 22 (1) (*a*) - **C.C.A. 247**

National Assistance Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *ss.* 42 (1), 43 (1) (2). **C.A. 506**

1949

Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *ss.* 2, 18. **C.A. 29**

1950

Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *ss.* 2 (4) (*a*), 10, 45 - - - **C.A. 479**

—— —— *s.* 3 (1) (*a*) (*c*) - **Divl.Ct. 286**

1954

Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2, *c.* 56), *ss.* 26, 57 (1), (4) (*b*). **C.A. 636**

—— —— *ss.* 30 (1) (*g*), 41 (2) - **C.A. 541**

—— —— *ss.* 30 (1) (*g*) (2), 44 - **C.A. 604**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948 (*S.I.* 1948, *No.* 184), *Sch.*, *Part II*, *paras.* 5, 9, 10 - **C.A. 58**

Defence (General) Regulations, 1939 (*S.R. & O.* 1939, *No.* 927) *as amended* (*S.R. & O.* 1945, *No.* 502), *reg.* 56A **C.A. 525**

Land Registration Rules, 1925 (*S.R. & O.* 1925, *No.* 1093/*L.* 28), *rr.* 74, 121, 123, 322, *Form* 35 - - **C.A. 379**

R.S.C., *Ord.* 11, *r.* 1 (*e*) (i) - - **C.A. 327**

—— *Ord.* 16, *r.* 11 - - - **C.A. 379**

—— *Ord.* 19, *r.* 14 - **Lord Goddard C.J. 417**

Solicitors' Remuneration Order, 1953 (*S.I.* 1953, *No.* 117 (*L.*1)), *Sch.* 2 **Gerrard J. and C.A. 252**

Standard Terms and Conditions of Carriage, 1927 (*Conditions* " *B* ") (*S.R. & O.* 1927, *No.* 1009), *Conds.* 3, 14 **McNair J. 177**

ERRATA

[1955] 2 Q.B. 29. *Woods* v. *Wise*, at p. 45, footnote 10. *For* " [1952] " Ch. 480 " *read* " [1952] Ch. 840."

[1955] 2 Q.B. 120. *Dean* v. *Wiesengrund*, at p. 138, footnote 19. *For* " [1921] 1 A.C. 27 " *read* [1922] 1 A.C. 27."

CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM
OR FROM COUNTY COURTS

AND BY THE

COURT OF CRIMINAL APPEAL

WATSON *v.* MURRAY & CO.

[1953 W. No. 1600.]

1954
Nov. 22, 23, 24, 25, 26, 29;
Dec. 6, 7.

1955
Jan. 11.

Hilbery J.

Execution—Sheriff—Powers of sale—Whether power to sell goods on land of debtor—What constitutes seizure—Excessive execution.

The writ of fi. fa. does not require or authorize the sheriff to seize the land or premises of a debtor. It requires him to make of the goods of the debtor sufficient to satisfy the execution creditors' judgment debt. It gives the sheriff a right to remain on the debtor's premises for a reasonable time and no longer, and it empowers him to sell sufficient of the debtor's goods to satisfy the debt in respect of which the writ was issued.

At common law the sheriff's duty is to remove the goods to some place where they can be safely kept until they are sold, but the sheriff has no authority given to him either by statute or by common law to hold the sale on the debtor's premises without leave or licence of the debtor.

Dictum passim in *In re Purcell* (1884) 13 L.R.Ir. 489 not followed.

Where, therefore, in the execution of a writ of fi. fa. the defendants as officers of the sheriff took steps, without leave or licence of the plaintiff, to hold a sale of the plaintiff's goods on her premises, 1954–55

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& CO.

by posting bills advertising such sale on the windows of the premises and by inviting members of the public on to the premises to view the goods it was proposed to sell:—

Held, that the defendants were guilty of acts of trespass towards the plaintiff, who, in the circumstances, was entitled to substantial damages.

Per curiam. If the sheriff can show that it was not possible to sell the goods except on the debtor's premises, it might be lawful for him so to do even without the debtor's permission. Part of the sheriff's duty is to sell the debtor's goods so as to make of them sufficient to satisfy the debt, which is the subject of the writ of fi. fa. which he has to execute, and the law will not require of him that which is impossible.

ACTION.

The following facts are taken substantially from the judgment. In March, 1951, the plaintiff bought the business of a ladies' and children's outfitter at Camberley, Surrey, for the sum of £7,014. She was without any previous experience in the ownership and control of such a business and by January, 1952, through overbuying of stock, she was beginning to be in grave financial difficulties. On January 2, 1952, a firm called Seton Cotterall signed judgment against her for £393 2s. 6d. On January 5, 1952, the plaintiff executed a bill of sale on a large number of the articles comprising the stock of her shop to secure a loan of £500, the lender of the £500 being one Mitchener.

On January 7, 1952, the defendants (acting as officers and agents of the Sheriff of Surrey), having received a writ of fi. fa. in respect of the judgment debt and costs, called at the plaintiff's shop, by one May their employee and representative, to demand payment of the amounts due, or, failing payment, to levy execution.

The plaintiff signed a form of "walking possession" agreement offered for her signature by May. Taking this "walking "possession" agreement so signed by the plaintiff with him, May left the plaintiff's premises. On January 16, 1952, Mitchener, the holder of the bill of sale, paid the amount then demanded by the defendants as representatives of the sheriff.

On February 20, 1952, a firm called Portenay signed judgment against the plaintiff for £235 5s. 2d. and £13 costs.

On March 3, 1952, the defendants, having received a writ of fi. fa. in respect of this judgment and costs, sent their same representative, May, to the plaintiff's premises for the same purpose as on the occasion of his call in January. Again the plaintiff signed a similar form of "walking possession" agreement as she had signed in January, with the same result, namely, that the sheriff's man did not remain on the premises. On March 18, 1952, the defendants removed 120 garments from the plaintiff's stock for sale by auction. On March 24, 1952, the money required by the sheriff was found and paid by the plaintiff.

On May 15, 1952, a firm called Hubert Gowns Ld. obtained judgment against the plaintiff for £132 10s. On May 16, 1952, the defendants again sent their representative May to the plaintiff's premises for the same purpose as on the previous occasions, and once more the plaintiff signed the form of "walking possession" agreement. Similar calls were made by May on May 27, June 10, June 13 and June 20, 1952, the defendants having received prior to each of such calls writs of fi. fa. in respect of judgments against the plaintiff for £210 1s. 6d., £60 11s., £102 8s. 6d. and £51 6s. respectively, making a total of indebtedness on the judgments of £556 17s., in addition to which there were sums for costs and sheriff's fees, charges and expenses.

On June 24 or 25, 1952, the defendants placed "lot" tickets on a number of articles in the plaintiff's shop with a view to holding an auction sale thereof at her shop, and they locked the shop and excluded the plaintiff therefrom from about 4.30 p.m. on June 24, 1952, until the morning of June 25, 1952. The defendants prepared and published posters advertising this proposed sale and advertised it in the press. The posters and the advertisements announced that the sale was to be without reserve at 48, High Street, Camberley, on July 4, 1952, and was to be a sale of "the valuable stock of a high class costumier and ladies' "outfitter . . . which will be sold by auction by Messrs. H. W. "Smith and Moon [a firm of auctioneers connected with the "defendants] on the premises as above on Friday, July 4, 1952, "at 12 o'clock noon."

The defendants posted a number of these posters on the window of the plaintiff's shop. On July 3, 1952, the defendants were exercising complete control over the premises and the goods which had been lotted, and were inviting viewers to come in and inspect the goods which were in the catalogue for the sale. By 11.15 a.m. on July 4, 1952, people were arriving for the sale. However, Moon, the auctioneer, who was at the premises, was informed by his partner Coombs by telephone that all moneys due had been paid and that the sale must be stopped. It was announced to those persons outside the shop who were there waiting for the sale to begin that it would not take place. After the sale had been stopped it was found that two of the garments which had been included in the catalogue were missing. The evidence plainly established that the plaintiff objected, and made it clear to the defendants that she objected, to their holding a sale on her premises.

The plaintiff brought this action, claiming (a) damages for trespass to goods and trespass to land; (b) damages for detinue and/or conversion. The defendants denied liability.

Leonard Caplan Q.C. and *William Frankel* for the plaintiff. A person with authority to enter premises for a particular purpose who uses them for a purpose not within the scope of his authority is a trespasser: *per* Lord Atkin in *Hillen and Pettigrew* v. *I.C.I. (Alkali) Ld.*[1] Under a writ of fi. fa. the authority of the sheriff is limited to entering on to the premises of the debtor and seizing such of the debtor's goods as would be reasonably sufficient to satisfy the amount indorsed on the writ. A sheriff who holds a sale or makes preparations to hold a sale on the premises of the execution debtor without the debtor's leave or licence is exceeding his authority under the writ of fi. fa. and is, accordingly, liable in damages to the debtor for trespass. *In re Purcell*,[2] an Irish case, is the only decision to the contrary, and the observations of Miller J. on the point are purely dicta and should not be followed: see Mather on Sheriff and Execution Law, 3rd ed., p. 126. There appears to be no reported English decision on this question.

Sir Frank Soskice Q.C. and *Michael Lee* for the defendants. In the case of distress, where the goods of the debtor are impounded on the premises, the distrainer may appraise, sell and dispose of them on the premises. But whether the goods are impounded on or off the premises, the debtor may, by a request in writing, have the goods removed (at his own risk and expense) and sold elsewhere. [Reference was made to Daniel's Law of Distress for Rent, 6th ed., pp. 115, 122.] A possible explanation of the observation of Miller J. in *In re Purcell*[3] is that he was equating the law of distress with that of execution in this respect. In any event, in a large number of cases it would be impracticable not to hold a sale on the premises, whether under a distress or under a writ of fi. fa., as, for example, a sale of heavy machinery in a workshop, or of theatrical equipment and the seats of the theatre.

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[1] [1936] A.C. 65, 69.

[2] (1884) 13 L.R.Ir. 489, 496.

[3] 13 L.R.Ir. 489, 495.

In *Ash* v. *Dawnay*[4] the plaintiff brought an action in trespass against the sheriff of Yorkshire, who had entered his dwelling-house under a writ of fi. fa., on the ground that by remaining on the premises for seven weeks the sheriff was liable in trespass for continuing in possession for longer than was reasonably necessary. It would appear from the pleadings that the sheriff held a sale on the premises. That case is of indirect assistance, for it would seem strange, if it be the law that the holding of a sale on the premises was a tortious act, that such a count was not included in the plaintiff's writ. During the summing-up the jury must have been asked the question: "the sheriff having "gone into possession with power to sell on the premises, did "he stay longer than was necessary to effect that purpose?"

The Lord Chancellor has power under the Sheriffs Act, 1887, to fix the fees which the sheriff is entitled to charge: section 20 (2). Pursuant to those provisions Lord Birkenhead L.C. in 1920 made an order (1920, S.R. & O. 1250 (L.36)) fixing the fees to be taken by sheriffs or sheriffs' officers concerned in the execution of writs of fi. fa. Paragraph 5 of the Schedule to the order fixes the fee: "*For removal of goods or animals* to a place of safe keeping, "when necessary, the sum actually and reasonably paid." The words ". . . *removal* . . . when necessary . . ." seem to contemplate that the expense of removal may not be necessary. This order, which has statutory force, seems plainly to contemplate that the sale may take place on the premises of the debtor. [Reference was made to Mather on Sheriff and Execution Law, 3rd ed., pp. 598, 603.]

Section 145 of the Bankruptcy Act, 1883, provides, in the case of executions, for a general power of sale, and it lays down the conditions for holding such sale, plainly to protect the interests of the debtor. It might well be thought that if for his protection a sale was not to be held on his premises such a prohibition would be found in that section. In the case of distress, section 5 of the Law of Distress Amendment Act, 1888, contemplates that normally a sale shall be held on the debtor's premises, for if he does not wish the sale to be held there he must make a request in writing for it to be held elsewhere.

Under the writ of fi. fa. the sheriff's duty is to seize the debtor's goods and in default of payment to sell. Prima facie that would include the power to sell on or off the debtor's premises. Where a person is given by law a power to interfere with the legal rights of another person, an action will generally lie if the person given the power exercises it maliciously. It cannot be said in the present case that the sheriff or his representatives have acted maliciously. [Reference was made to *Lee* v. *Dangar, Grant & Co.*[5]] It was expressly decided in *Mortimore* v. *Cragg*, *per* Brett L.J.,[6] that where an execution issues the transaction may be divided into four parts: (1) The delivery of the writ to the sheriff; (2) seizure; (3) the possible payment of money after seizure; and (4) if no payment, sale. The sheriff, therefore, is by compulsion of the writ to secure payment of the debt. That proposition is prayed in aid to show that it is necessary to look at the sheriff's powers in general terms. No further guidance is given to the sheriff in exercising his powers than what is stated in *Mortimore* v. *Cragg* [6]—seizure; if no payment, sale.

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[4] (1852) 8 Exch. 237.

On other aspects of the sheriff's powers under a writ of fi. fa. reliance is placed on the following propositions: Delivery of the writ creates a general charge over all the debtor's goods until specific goods are physically seized: *Union Bank of London* v. *Lenanton.*[7] Excessive seizure of goods gives rise only to an action on the case in respect to the excess of goods seized. If it be held, contra, that an action lies in trespass, the sheriff in any event is a trespasser ab initio in respect to excess of goods seized and not of the premises: *Harvey* v. *Pocock* [8]; *Canadian Pacific Wine Co. Ld.* v. *Tuley* [9]; *Elias* v. *Pasmore* [10]; *Lynne* v. *Moody.*[11] [Reference was also made to Coke, Institutes of the Laws of England, Part 2, p. 394; Sale of Goods Act, 1893, s. 26; *In re Davies* [12]; *Samuel* v. *Duke*,[13] and *Woodland* v. *Fuller.*[14]]

Leonard Caplan Q.C. in reply. With regard to seizure; the law is clearly stated in *Gawler* v. *Chaplin* [15]: " . . . the duty of " the sheriff . . . is to seize only such quantity of goods as would " be reasonably sufficient to pay the amount indorsed on the " writ." If the sheriff seizes more, then quoad the excess he is guilty of trespass to goods. As to what amounts to an actual seizure, see *per* Bramwell B. in *Gladstone* v. *Padwick.*[16] The seizure in the present case was excessive. This is not a case for nominal damages; the fact that a plaintiff has a right to use the goods seized does not prevent him from recovering damages: *Bayliss* v. *Fisher.*[17]

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[5] [1892] 2 Q.B. 337, 344.

[6] (1878) 3 C.P.D. 216, 219.

[7] (1878) 3 C.P.D. 243; 47 L.J. Q.B. 409, 412, 413.

[8] (1843) 11 M. & W. 740.

[9] [1921] 2 A.C. 417, 424, 425.

[10] [1934] 2 K.B. 164, 168.

[11] (1729) 2 Strange 851.

[12] (1872) L.R. 7 Ch. 314, 317.

[13] (1838) 3 M. & W. 622, 628.

[14] (1840) 11 Ad. & El. 859.

[15] (1848) 2 Exch. 503, 506.

[16] (1871) L.R. 6 Exch. 203, 212.

When a sheriff is executing a writ of fi. fa. it is necessary to make a careful distinction between goods and landed property. The sheriff has no power under the writ to disturb the possession of landed property of the debtor at all. His duty is to seize the debtor's goods, and it is for that purpose that the sheriff has an implied authority to go on to the land. But even this right is not unlimited, for the sheriff has no right to break into another's house to seize the debtor's goods. The sheriff has a right to remain on the land of the debtor for a reasonable time in order to effect his purpose. He has also a right to sell the debtor's goods, but there is *no necessity* for him to sell them on the debtor's premises, thus using them as a saleroom. In this connexion it is helpful to compare the law of distress with execution. Originally both remedies were regulated by the common law. At common law the position as regards distress was clear; the goods had to be removed to a lawful pound, however inconvenient the circumstances might be; there was no right to sell them upon the debtor's premises: *Reed* v. *Harrison.*[18] Then section 10 of the Distress for Rent Act, 1737, gave power to hold a sale on the premises of the debtor. The conferment of this power required express statutory authority. There is no similar statutory provision in respect of execution. There is no such *express* power given under section 145 of the Bankruptcy Act, 1883.

The present position at law as regards execution is the same as it was in distress before it was altered by statute. It follows that, if the defendants were not entitled to use the plaintiff's premises as a saleroom, they were not entitled to use them in preparation for a sale thereon, for in so doing they were exceeding the limited rights conferred upon them by the writ of fi. fa.

The observations of Lord Esher M.R. in *Lee* v. *Dangar, Grant & Co.*[19] are plainly too wide, for they are not in accordance with the numerous decisions in which sheriffs and their officers have been successfully sued in trespass for remaining for too long a time upon the debtor's premises. Malice is no constituent of the action of trespass, although it may go to damages as an aggravation of the tort.

The importance of the present case lies in the fact that if the plaintiff is correct a sheriff and his officers have no right to hold

[17] (1830) 7 Bing. 153.

[18] (1778) 2 Wm.Bl. 1218.

[19] [1892] 2 Q.B. 337, 344.

a sale in the house of an execution debtor, to throw open its doors for the contents to be surveyed by the curious, to stick bills with notices of the sale upon the windows of the house, and leave it with the debris of a sale left therein. As to damages in trespass, see *Bracegirdle* v. *Orford.*[20] The proper method of assessing damages is to consider the totality of the tortious acts of the sheriff and his officers, and not to assess damages on the separate tortious acts. [Reference was also made to Halsbury's Laws of England, 3rd ed., vol. 2, pp. 117, 139, 140.]

Cur. adv. vult.

January 11. HILBERY J. This is a claim for damages for alleged trespasses to goods and land of the plaintiff by the defendants acting as officers of the Sheriff of Surrey, coupled with a claim for £18 as damages for detinue or conversion of two women's dresses, the property of the plaintiff, alleged to be of that value. The alleged trespasses complained of by the plaintiff were all acts said to have been done by the defendants acting as sheriff's officers in the course of executing writs of fi. fa. delivered to them. The plaintiff alleges that in January, 1952, in March, 1952, and in May, 1952, there were excessive seizures by the defendants when executing writs of fi. fa. and that the defendants thereby trespassed on the plaintiff's goods. Next, the plaintiff alleges and complains that in the course of executing such writs, the defendants took possession of her shop and excluded her from the control thereof on two occasions, namely, on January 15 and 16, 1952, and on June 25 and during part of July 2 and the whole of July 3.

[His Lordship set out the facts substantially as stated above, and continued:] The first question to be considered is whether what took place when May went to the premises on January 7, armed with the writ of fi. fa., amounted in law to a seizure of the plaintiff's goods. May is now dead, but his report on his visit is in evidence. He states that on calling he informed the plaintiff of the nature of his visit and was told by her that there was a bill of sale on all the stock and fittings in the shop in favour of one Mitchener; she stated that her solicitor had tried, evidently unsuccessfully, to arrange for payment of the debt by instalments, and that she was not in a position to pay anything on account that day. May reported that it was a very good class shop and fairly well stocked with ladies' dresses, suits, gloves, stockings, and so on. The plaintiff's evidence was that May came at about 10.30 a.m. on Monday, January 7, and handed the plaintiff the defendants' card showing that they were sheriff's officers, that he was their representative, and that he said that he must take charge of everything in the shop; that she said that she did not want him in the shop and asked him what right he had to stay there; that May then produced a printed form and said that if she signed it and guaranteed to pay him the money which she took, except whatever was required for staff wages, he need not stay all the time. Thereupon the plaintiff signed the printed form which the defendants regularly use and which is known as a walking possession agreement. It is in the following terms: "Dated (blank). To the Sheriff of the County "of Surrey and to Messrs. Murray & Co., his Officers. (Blank) "v. (blank). In consideration of your not keeping the man in "charge of the goods seized herein in close possession, and "allowing him to leave each night and attend each day (or as "may be arranged) I hereby authorize and empower you and "your representative to re-enter my house and premises, No. "(blank)," and then a space is left for the address "at any "time you may think proper, under a writ of fi. fa. in the above "action dated (blank) and if necessary to use force for that "purpose, and I also undertake not to remove, or allow to be "removed, any of the goods in the meantime, and to pay the "possession money day by day."

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[20] (1813) 2 M. & S. 77.

It was argued for the defendants, these being the facts—and I think that the plaintiff's evidence here is substantially accurate—that there was no seizure: that all that May did and said only amounted to an explanation by him of what the legal situation would be if the plaintiff did not either satisfy the judgment debt or sign the walking possession agreement, and that as the plaintiff thereupon signed the agreement no seizure was made and the defendants contented themselves with the notional possession which resulted from the agreement. I am unable to accept this contention.

On the subject of what is sufficient to constitute a levy or seizure by the sheriff in execution of a writ of fi. fa. there is fortunately some authority. In *Bissicks* v. *Bath Colliery Co. Ld.*,[1] where the sheriff's officer went to the plaintiff's premises and told him that he had a warrant to execute a writ of fi. fa. for £28 7s. 2d., that he required immediate payment, that otherwise further proceedings would be taken, and that the man must remain in possession, and the plaintiff paid the sums demanded, including poundage and levy fees, the court held that the sheriff was entitled to both those items, Cockburn C.J. saying[2]: "We "must look to see if the writ has been *virtually* executed," and Cleasby B. saying[3]: ". . . I think in this case there was in "substance an actual levy." On appeal from that decision Bramwell L.J. said[4]: "The question is whether upon the facts "there was a seizure, . . . upon the whole I think there was a "seizure, for the officer did threaten to leave a man in posses-"sion." Brett L.J. said[5]: "I agree that there must be a "seizure; but upon the facts I think there was a seizure. The "sheriff's officer went to the plaintiff's house with a man, he "obtained entry into the house, and whilst he was there the "plaintiff's goods were under his control; he spoke as if he had "made a seizure, and he treated what he was doing as if it was a "seizure." In addition, it has been expressly decided by Brett L.J. in *Mortimore* v. *Cragg*[6] that where an execution issues, the transaction may be divided into four parts: (1) the delivery of the writ to the sheriff; (2) seizure; (3) the possible payment of money after seizure; (4) if no payment, sale.

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[1] (1877) 2 Ex.D. 459.

There can be no doubt that May went on each occasion armed with a warrant for the purpose of executing a writ of fi. fa. When he says in his report that he informed the plaintiff of the nature of his visit, and the plaintiff, as I believe, asked what right he had to stay there, and expressed her objection to his staying, and when I find that he took an agreement in the form in which he did take it, I am satisfied that there was what amounted to a seizure. The opening words of the agreement are "in consideration of your not keeping the man in charge of the "goods seized herein in close possession." Those are words chosen and put forward by the defendants themselves. They are only consistent with the fact that goods have been seized.

Furthermore, by the concluding words of the agreement the plaintiff undertook "not to remove, or allow to be removed, any "of the goods in the meantime, and to pay possession money day "by day." Again, those words are only consistent with there having been a seizure. In *Gladstone* v. *Padwick*,[7] where one of the questions was whether what was done by the sheriff's officer on a certain date amounted to an actual seizure, Bramwell B.

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[2] 2 Ex.D. 459, 462.
[3] Ibid. 462.
[4] (1878) 3 Ex.D. 174, 175.
[5] 3 Ex.D. 174, 175.
[6] (1878) 3 C.P.D. 216, 219.
[7] (1871) L.R. 6 Exch. 203.

in his judgment said[8]: "It is admitted, and it is clear, that "it is not necessary for the sheriff to lay his hand on a single "article . . . I am of opinion that, where property is all one "holding, as it was here, if the sheriff goes and makes known . . . "that he is come to seize, and does, so far as words and intention "can go, seize all the goods on that holding, he has done "enough." Those words are applicable to what took place on each of the occasions in January, March, May and June, when May called at the plaintiff's shop and premises to execute the several writs of fi. fa. which figure in this case.

It was urged for the defendants that the position of the sheriff which resulted from what was done and said on each of the occasions when May called on the plaintiff, and entered her premises for the purpose of executing the writ, was not that the defendants as sheriff's officers had seized, but that they had obtained contractual rights under the several walking possession agreements which the plaintiff signed, the result of which was to give them a notional possession. It is true that in *Lumsden* v. *Burnett* A. L. Smith L.J. spoke of such an agreement as giving only a constructive possession,[9] and Chitty L.J. spoke of it as giving a possession merely constructive or notional.[10] In that case the court held that the existence of such an agreement was strong evidence to show that the officer leaving the premises in the terms of such an agreement was not abandoning possession. In that case, as in this, after leaving the premises, having obtained the walking possession agreement, the officer paid a subsequent visit or visits to the premises to see that the goods were not being removed. I think it is right to say that after seizure the sheriff may continue in possession either actually by leaving a man in the premises or notionally under such a walking possession agreement as was obtained on each occasion from the plaintiff in this case.

Since, therefore, in my view there was on each occasion a seizure, it becomes necessary to consider whether in January and March or in May and June the seizures were excessive so as to give rise to an action on the case against the sheriff. That an excessive seizure gives such a cause of action was decided in *Gawler* v. *Chaplin*.[11] In that case the first alleged breach of duty on the part of the sheriffs was that they had wrongfully seized goods of the plaintiff of greater value than sufficient to pay the debt, interest, poundage and expenses, although they well knew part would be sufficient. On motion in arrest of judgment after verdict the question was whether that alleged breach was good in law. It was held that it was. In giving the judgment of the court Parke B. said[12]: ". . . in the first instance, the duty "of the sheriff is confined to seizing goods that would be reasonably sufficient, if sold, to pay the sum indorsed on the writ— "that is, the debt, interest upon the debt, poundage, and "expenses; and if the sheriff seizes more, prima facie he is a "wrongdoer." There can be no doubt on the evidence that the stock in the plaintiff's shop was far more extensive than it was necessary to seize to satisfy the judgment debt in respect of which either of the writs of fi. fa. in hand in January and February was issued together with the other charges enumerated by Parke B.

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[8] L.R. 6 Exch. 203, 212.

[9] [1898] 2 Q.B. 177, 184; 14 T.L.R. 403.

[10] [1898] 2 Q.B. 177, 186.

[11] (1848) 2 Exch. 503.

There was, therefore, in my judgment a seizure on each occasion which was excessive. But it resulted in no damage to the plaintiff. She was allowed to carry on her business as before and did so until the sheriff was paid out. With regard to the alleged seizure in March on the fi. fa. issued in respect of the Portenay judgment for £235 and £13 costs, I am satisfied that when May called to execute the writ of fi. fa., substantially the same course was followed, and that there was therefore what amounted in law to a seizure in the first place of all the plaintiff's stock at her shop, and this was an excessive seizure. Again, however, there was an exactly similar walking possession agreement signed by the plaintiff, and again she was allowed to carry on her business without interruption and with power to dispose of any of the items which formed part of the stock by way of sale until March 18.

On March 18, however, the defendants took actual possession of 120 dresses and removed them for sale, and it was conceded in the course of the case that this actual seizure and removal was not excessive. The only claim, therefore, which remains is for the technical seizure of the whole stock, prior to the selection and removal of the 120 garments made on this occasion when the defendant's man May called to execute the writ of fi. fa. on March 3. It is true that that general seizure was in law effective until the particular seizure of the 120 garments only was made on March 18, but again it resulted in no damage to the plaintiff inasmuch as she was left by agreement with power to deal with the whole of that stock in the ordinary course of her business.

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[12] 2 Exch. 503, 507.

The sale of the goods so collected and removed was arranged for March 25 at the auction rooms of E. Reeves Ld. at 114, Church Street, Croydon, but on March 24 the execution was paid out and the sale was abandoned.

I turn now to the happenings in May and June. On May 16 the defendants having received a writ of fi. fa. in respect of judgment for £132 10s. obtained against the plaintiff, sent their representative May to the plaintiff's shop to execute the writ. Once again from the plaintiff's evidence and May's written report I find that substantially the same procedure was gone through between May and the plaintiff as on the previous occasions, and I am satisfied that he then made what amounted in law to a seizure of the contents of the shop. That the defendants themselves regarded what May did on that date as a seizure there can be no doubt, for there is a letter from them to the judgment creditors' solicitors dated May 28, headed "Hubert "Gowns Ld. *v.* Watson" which begins: "We duly seized under "this execution on the 16th instant." On May 26, being in possession of a writ of fi. fa. in respect of a judgment for £210 1s. 6d. obtained by a firm called Stafford Ld., the defendants again sent May to execute the writ. May's written report as to what passed, using the same language as before, says that he informed the plaintiff of the nature of his visit. Again I can only conclude that he purported to make a seizure.

On May 27, through her solicitor, the plaintiff pleaded with the defendants to defer action, saying there were funds due to the plaintiff which he hoped would become available to satisfy the two executions. By a letter of May 30 Mitchener, the bill of sale holder, wrote that with regard to these two executions he made no claim against "their goods," whatever that may mean. It was apparently taken to mean that he abandoned any claim he might have under the bill of sale. On June 10 there was a third execution in respect of a judgment obtained by Lennox Knitwear Ld. for £60 11s. On June 13 there was another execution in respect of a judgment obtained by Sidney J. Lindsay Ld. for £102 8s. 6d. Again in his reports May uses the same language as before to describe what passed between him and the plaintiff when he called to execute each of the writs of fi. fa. issued in respect of these two judgments.

On June 21 the defendants received yet another writ of fi. fa. in respect of a judgment obtained by Wallace Thorn Ld. for the sum of £51 6s., and, armed with the appropriate warrant, May called on the plaintiff and informed her, as he reported, of this judgment. Again I think that he intended what he did when he called as execution of the writ of fi. fa., and there is no doubt that the plaintiff regarded and accepted it as such. In view of what subsequently transpired it is not unimportant to notice that in response to the plaintiff's solicitor's plea to them to defer the actual sale of the plaintiff's goods to satisfy the executions of May 16 and 26, the defendants not only delayed action for the seven days asked for, but agreed by a letter of June 3 to refrain from taking any steps towards auction until June 6, and that on June 4 the plaintiff's solicitor wrote in reply that he appreciated their consideration in these matters. If the necessary money was not forthcoming by June 11 the plaintiff's solicitor, Mr. Barnes, in a telephone conversation on the 10th, agreed that the defendants must proceed with a sale. Again on June 11, by which time there were, as I have pointed out, these several executions current, Mr. Barnes was writing that funds were expected and would undoubtedly come into his hands very shortly, but that he appreciated that the defendants could not refrain from carrying through the executions indefinitely and must therefore proceed.

In addition to being a partner in the defendants' firm, Moon owns and conducts the business of an auctioneer under the name of H. W. Smith & Moon. Coombs, who is Moon's partner in the defendant firm, had all the executions in question in his hands. On June 21, writing in the name of the defendant firm, he instructed H. W. Smith & Moon, that is to say, Moon, his partner, in his capacity as the auctioneer, to attend at the plaintiff's premises as soon as possible to make an inventory and catalogue of sufficient effects to realize the sum of £608 plus 8s. 6d. per day after June 23 and Moon's charges. He informed Moon in the same letter that there was no claim being made any longer by Mitchener. He then concluded the letter as follows: "We leave it to you as to whether it is "best either to remove for sale or sell on the premises. If the "latter course is decided on by you we must ask you to hold the "sale at the very earliest moment, in any event not later than "July 2 or 3 next. Furthermore, if the sale is being conducted "on the above premises, particular care must be taken to safe-"guard the effects and stock, that is, the premises must be closed "and the keys held. If there is any risk of goods being disposed "of by the defendant, they had better be removed for sale."

On receipt of that letter Moon, by telephone, tried to arrange as before with Reeves Ld. auction rooms for a sale of whatever articles he decided must be taken from the plaintiff's stock to satisfy the current executions and charges. Reeves Ld., however, refused facilities for the sale. On June 23, 1952, they wrote giving their reasons, saying: "Our auction rooms are "open for the reception of goods for absolute sale at any con- "venient time, but where goods have to be withdrawn after the "sale has been advertised and prepared entails not only pecuniary "loss as on the last occasion, but upsets the timing of the sale "of other lots besides putting us in disfavour with the trade."

Pursuant to his instructions, Moon attended to prepare for sale, deciding in his own mind that in the circumstances the sale must be held on the premises. I am satisfied that he decided he must hold the sale on the premises in good faith, and not with any malice towards the plaintiff. By the delays which the defendants had conceded, they were in danger so far as the several judgment creditors were concerned. It was urgently necessary that they should sell and satisfy the several writs and executions then in hand before what had occurred constituted an act of bankruptcy on the part of the plaintiff. From experience they knew that it would be most difficult to find any auctioneer with an auction room which could accommodate the goods for sale who would be willing to hold the sale. From experience they knew that any such auctioneer would make the same objection as Reeves had made when refusing to undertake the sale, more especially as all auctioneers knew that the remuneration allowed them on a sheriff's sale was much less than that which they ordinarily charged and received. Any auctioneer would know that he might be allowed only 7 per cent. if the sheriff's bill was taxed, as against his ordinary remuneration of 12½ per cent.

The defendants had delayed selling the plaintiff's goods at the request of the plaintiff to give the plaintiff time to get in hand the moneys which her solicitor was saying were expected and which would enable her to pay out the executions. The consequence was that the selling of the goods had become a matter of extreme urgency. It was for these reasons that Moon decided to sell on the premises. He attended at the premises on June 23 and went over the whole stock, intending to sell something of everything to an extent which would provide the amount required, and to leave stock which would enable the business to be carried on. He prepared a posting bill and sent it to the printers that day in order to announce the sale as soon as possible.

He informed the plaintiff that he intended to hold the sale on the premises. That the plaintiff objected there is no doubt, and that Moon knew that she objected I have no doubt.

On June 24 Moon again attended all day at the shop and lotted for catalogue purposes about 280 lots. He made a rough assessment of what they might fetch under the hammer. He calculated that they might make an overall average of 50s. a lot. That afternoon, when he left, Moon caused the shop to be locked up, thereby excluding the plaintiff from her own premises because, he said, he felt an element of risk. If there was an element of risk the duty of the sheriff was to leave a man in possession or to remove the goods which he intended to sell. It is no answer to say that today he cannot obtain a man who will do this at the scale fee allowed to a sheriff for a man in possession.

In my view it was a trespass on the plaintiff's property to put himself into exclusive possession of her premises by locking them against her and taking possession of the keys. Either that day or the 25th the defendants kept the shop locked all day.

On July 2, posters were stuck on the windows of the shop on the defendants' instructions. On July 3, some of the defendants' men were at the premises, keeping the premises open for viewing, but allowing the plaintiff to carry on her business so far as she could in such circumstances. The goods for sale which were there to be viewed were put at the back of the shop and in one show case. The defendants' representatives did not keep a continuous watch on the viewers and the goods which they had thus lotted and separated. It was admitted by the defendants that they left the premises for meals. The result was that the next day, after the executions had been satisfied and the proposed sale abandoned, it was found that two of the lotted garments were missing. Apparently they had been stolen. There is no evidence that the plaintiff had sold them, and I am satisfied that the plaintiff is not dishonest and would not have insisted, as she did, on having a written acknowledgment by the defendants' man on the premises that these two garments were missing if she had been conscious that she had herself taken them and sold them. Even if, as it was argued for the defendants, the plaintiff can only recover the value of these lost garments if she proves that they were lost through the defendants' negligence, I am of opinion that she has shown that. If the defendants were keeping the shop open for anyone to come in and view the garments lotted for sale and taken by them into their possession and control, they were guilty of negligence if they left those garments unattended.

The plaintiff's claim for £18, the value to her of these lost garments, is therefore in my view well founded.

After the viewing was over the defendants again locked up the premises and kept the keys. On July 4 the premises were opened by the defendants for the holding of the sale, but it was stopped, and no sale took place because the necessary moneys were paid on the plaintiff's behalf.

The questions which have to be decided in connexion with these happenings in June and July are: first, did the defendants trespass by preparing for this sale on the premises and by using the premises for their preparations for the sale and by posting the bills announcing the sale on the plaintiff's premises without her permission and in spite of her objection, of which they knew?; and secondly, did the defendants on this occasion make an excessive seizure in taking for sale what appears in the catalogue?

On the second question there was much evidence on both sides. The plaintiff's contention that the seizure was excessive is mainly based on evidence that at such a sale one might ordinarily expect to realize a certain fraction or percentage of the retail prices of the articles, and on the fact that at a later date the fixtures which were included in the catalogue sold for a comparatively large sum, and the other articles realized, when sold by tender, about 25 per cent. of their retail price. On the other hand, the defendants' evidence and contention was that it is in the highest degree uncertain what such goods will fetch under hammer, much depending on whether there is a good or a poor attendance at the sale; that a sale such as this held in the country will be likely to realize less than if held in a London auction room; that such a sale largely depends on the weather and on the trade buyers attending, and that the sheriff must always allow a margin, as he has a duty to the execution creditors to execute the writ so as to make of the goods sufficient to satisfy the executions.

I am satisfied that the defendants, in lotting and cataloguing what they did, acted in good faith; and I am not satisfied, having regard to the hazards attending such a sale, that there was an excessive seizure. It must be remembered that most of the goods in question were seasonal and fashion goods. Moreover, it by no means follows that anything like all the lots would necessarily have got a bid at all.

The serious question which remains is whether the defendants had any right in law to insist on using the plaintiff's premises as they did for the purposes connected with holding this sale there. It is clear that the writ of fi. fa. does not require or authorize the sheriff to seize the land or premises of a debtor. It requires him to make of the goods of the debtor sufficient to satisfy the execution creditors' judgment debt. It gives the sheriff a right to remain on the debtor's premises for a reasonable time, and no longer (see *Ash* v. *Dawnay* [13]), and it empowers him to sell sufficient of the debtor's goods to satisfy the debt in respect of which the writ was issued.

Reed v. *Harrison* [14] is authority for saying, as the headnote to that case expresses it, that "on attachment of goods, the officer "cannot legally continue in possession of the defendant's house, "or keep the goods therein for a long and unreasonable time, "but must remove them to a place of safe custody: else he is "a trespasser ab initio."

At common law the sheriff's duty is to remove the goods to some place where they can be safely kept until they are sold, but I cannot find any English authority which decides that he can, if he chooses, use the debtor's premises for the purpose of holding a sale there. It does not appear to me that in this case it is established that it was impossible to hold the sale anywhere else than on the plaintiff's premises. It was, no doubt, extremely difficult in the particular circumstances to arrange for it elsewhere, and no doubt the defendants decided that it was expedient to hold the sale at the plaintiff's shop; but the plaintiff objected and they knew that she objected. They must in those circumstances, it seems to me, show that they had a legal right to do what they did notwithstanding the plaintiff's objection.

In Mather on Sheriff and Execution Law, 3rd ed., p. 126, there is reference to an Irish case in which it is said it was held that a sale should as a rule take place on the execution debtor's premises (*In re Purcell* [15]), but the editor immediately goes on to say: "It would certainly be better that the sheriff should "obtain the debtor's licence to hold the sale upon his premises, "as there appears to be some doubt as to his authority to use "the premises for the purpose of a sale."

In my view, an examination of the facts and the judgment in the Irish case shows that the statement that it was there held that a sale should as a rule take place on the execution debtor's premises is an overstatement. That opinion was expressed passim by Miller J. when he said [16]: "he (the sheriff) does not "allege that he made any attempt whatever to make any sale of "the goods upon the premises of the execution debtor which was

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[13] (1852) 8 Exch. 237.

[14] (1778) 2 Wm.Bl. 1218.

[15] (1884) 13 L.R.Ir. 489.

[16] Ibid. 496.

"his primary duty." This statement was made in a part of his judgment when the judge was commenting on the sheriff's claim to his expenses in removing and returning goods of the debtor to the debtor's premises, but after he had already decided that the sheriff could only recover the fees and expenses which were provided for him by the Act passed in the sixth year of the reign of Queen Anne and by the Act 43 Geo. 3, c. 46, s. 5, and that these expenses of removal and of return of the goods were not provided for the sheriff by those statutes. The case is not therefore, in my view, a direct authority for the proposition that it is the duty of the sheriff to sell the debtor's goods on the debtor's premises. Counsel before me in this case have not found (nor have I been able to find) any authority which decides that such is the duty of the sheriff acting under a writ of fi. fa. The defendants' evidence in this case shows that the practice is to remove and sell in an auction room such goods as were here seized. It may be that if the sheriff can show that it was not possible to sell the goods except on the debtor's premises, it would be lawful for him so to do. Part of his duty is to sell the goods so as to make of them sufficient to satisfy the debt which is the subject of the writ of fi. fa. which he has to execute, and the law will not require of him that which is impossible. But the defendants in this case have not established that it was impossible to remove and sell the goods away from the plaintiff's premises. They have shown that by the concessions they had made to the plaintiff it had become extremely difficult for them so to do before an act of bankruptcy by the plaintiff was committed, but their evidence does not amount to more than this.

There were, therefore, in my view trespasses on the plaintiff's property committed by them when they did those acts which were solely done for the purposes of and as incidental to the holding of the sale on the plaintiff's premises. The acts which in my view were such trespasses were the locking of the plaintiff's premises so as to exclude her therefrom when they had lotted the goods; the opening of the plaintiff's premises to the public for the viewing of the goods catalogued and the admission by them to the plaintiff's premises of all who chose to come in for the ostensible purpose of viewing the goods; and the posting of their posters on the plaintiff's premises. What damage the plaintiff suffered in consequence it is difficult to say, but the poster certainly was in terms which would convey to anyone reading it that the plaintiff's stock and the fixtures in her shop were being sold, and anyone reading it might reasonably have concluded that the business life of the shop was ended. The result was said to have been that the plaintiff's takings thereafter were so prejudicially affected that she was obliged finally to sell up and close down. That her takings afterwards were trifling compared with what they formerly had been was shown by the accounts of the business, but to what extent this would inevitably have been the case owing to her grave financial difficulties it is not possible to decide.

But I do not think it can be doubted that the posting on the premises of such bills as were put there must have been damaging to her chances of making a business recovery. Moreover, the fact that the bills were there on the viewing day and on the morning of the day of the intended sale, in spite of her protests and in spite of the fact that she had once before then abated the trespass by removing the poster bills, amounted to conduct which aggravated the damage and which may properly be taken into consideration. I assess the damages for these trespasses, therefore, as more than nominal and award £300.

One last matter has to be decided. The plaintiff has claimed that on January 15 and 16 the defendants wrongfully took possession of her shop by locking it up, and excluded her therefrom. This claim was never made by her solicitor when, from time to time, he was writing to complain that the defendants had acted unlawfully. He alleged excessive seizures but never suggested that they had thus excluded the plaintiff from her shop on these dates. It was not made when the statement of claim was delivered. It was made for the first time by way of amendment on November 3, 1954. It is based on the plaintiff's evidence, on the fact that her takings book shows that there were no takings on these two days, and on a letter of Coombs (disclosed since action brought) dated March 10, 1952, in which, when giving instructions to Moon to go to the premises to check the goods on the premises against the schedule to Mitchener's bill of sale, Coombs said: "You will remember that on a former occasion it "was found necessary to close the shop."

I heard Coombs explain this, and I find his evidence is supported by Moon, who denies that the shop was locked against the plaintiff on January 15 and 16. I thought that Coombs was a truthful and reliable witness. He said that he wrote this sentence under a misapprehension, and I believe him, and I am not satisfied that the defendants excluded the plaintiff from her premises on these two dates.

There must be judgment for the plaintiff for £300 damages and for £18, the value of the two garments lost.

Judgment for the plaintiff.

Solicitors: *Harold Kenwright & Cox; Wigan & Co.*

J. A. G.

ANSPACH *v.* CHARLTON STEAM SHIPPING CO. LD.

C. A.

1955
Jan. 26,
27, 28.

Denning,
Birkett and
Parker L.JJ.

Landlord and Tenant—Rent restriction—Standard rent—Existing furnished tenancy—Subsequent unfurnished tenancy with benefit of furnished tenancy—Whether standard rent fixed by unfurnished tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*a*) (*as amended*).

In 1940, whilst there was already in existence a furnished letting of a flat at £190 per annum, the owners, K. Co., granted to C.W.B. Co. a five years' lease of the flat, unfurnished, at £115 per annum, with the benefit of the existing furnished tenancy. The two companies were closely associated and had some directors in common. In 1945 the defendant landlords bought the freehold and continued to let the flat furnished until September, 1951, when an unfurnished tenancy of the flat was granted at £275 per annum. There had been no unfurnished letting of the flat before 1940. On an application for the determination of the standard rent:—

Held, (1) that the fact that in 1940 there was a tenant in occupation under a furnished tenancy did not take the flat outside the Rent Restriction Acts and thereby prevent the unfurnished lease from establishing a standard rent.

(2) That the lease of 1940 was not a sham as in *Conqueror Property Trust Ld.* v. *Barnes Corporation* [1944] K.B. 96; 60 T.L.R. 75; [1944] 1 All E.R. 34, and although it might be a transaction of a financial nature between two associated companies it nevertheless fell within section 12 (1) (*a*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

(3) That although C.W.B. Co. might have taken the lease for a business investment and did not intend to occupy the premises themselves, this did not make the letting a letting for business purposes so as to exclude it from the operation of the Acts.

Accordingly the standard rent was £115 per annum.

Prout v. *Hunter* [1924] 2 K.B. 736; 40 T.L.R. 868 considered.

APPEAL from a decision of Judge Bensley Wells sitting at Marylebone County Court.

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

C. A.
1955

Anspach
v.
Charlton
Steam
Shipping
Co. Ld.

In 1940 a flat within the Rent Restriction Acts and known as 71, Ivor Court, Gloucester Place, N.W.1, was let furnished at a rental of £190 per annum. It had not at any time prior thereto been let unfurnished. In September, 1940, the owners, Knight & Co. Ld., granted a lease of the flat to C. W. B. Finance Co. Ld. for five years at £115 per annum unfurnished. The rent included £5 per annum for electricity, and the lease was granted with the benefit of the existing furnished letting. The two companies were closely associated and had some directors in common.

In June, 1945, the Charlton Steam Shipping Co. Ld., the present landlords, bought the freehold of 71, Ivor Court. At that time the flat was let furnished at £312 per annum, but no evidence was adduced to prove that the flat had been let furnished continually throughout the period of the lease. The landlords continued to let the flat furnished until September 29, 1951, when an unfurnished tenancy at £275 per annum was granted. The tenant applied to the county court for a determination of the standard rent, in accordance with the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1).[1] Both the county court registrar and the county court judge held that the standard rent of the flat was fixed by the lease of 1940 and was therefore £115 per annum. The company appealed.

L. A. Blundell for the landlords. It is admitted that the 1940 letting was not a sham, as was the case in *Conqueror Property Trust Ld.* v. *Barnes Corporation*,[2] but it did not fix the standard rent because it is not the type of letting contemplated by the Acts. If the standard rent is not fixed by the rent paid by the occupying tenant, because, for example, it is a furnished tenancy, then one must look to another date altogether. Intermediate tenancies should be disregarded. Bankes L.J. had this in mind in

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[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (as amended by the Act of 1939): "(*a*) The expression 'standard rent' means the rent at which the dwelling-house was let on September 1, 1939, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said September 1, the rent at which it was first let."

Subs. (2): "This Act shall apply to a house or a part of a house let as a separate dwelling . . ."

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 16 (1): ". . . 'Dwelling-house' has the same meaning as in the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let."

[2] [1944] K.B. 96; 60 T.L.R. 75; [1944] 1 All E.R. 34.

Glossop v. *Ashley*.[3] *Signy* v. *Abbey National Building Society*,[4] *Roberts* v. *Jones*[5] and *Edgware Estates Ld.* v. *Coblentz*[6] show that for a letting to fix a standard rent it must be one for purposes contemplated by the Acts, and these cases have put a gloss on the words of the Acts. A further gloss is needed. On its true construction the transaction in 1940 between Knight & Co. Ld. and C. W. B. Finance Co. Ld. was for a business object. In so far as *Ebner* v. *Lascelles*[7] is contrary to the landlords' argument it is wrong. If there is a letting to a person not in occupation, then the circumstances of the letting must be very carefully scrutinized. There must be a letting within the ambit of the Acts to fix the standard rent and the facts in this case show that there was not such a letting.

The existing furnished letting took the flat outside the Acts: *Prout* v. *Hunter*.[8] The 1940 transaction was therefore entered into in respect of premises outside the Rent Acts, and a standard rent can only attach at a time when the house concerned is within the Acts. Even if there were a gap between the furnished letting in 1940 and that in 1945, that is irrelevant. The material date is when the 1940 letting was entered into. Subsequent variations do not alter the position. [Reference was made to *Welch* v. *Nagy*,[9] *Stagg* v. *Brickett*[10] and *Seabrook* v. *Mervyn*.[11]]

John Wilmers for the tenant. For the landlords to succeed a gloss must be put on the ordinary and natural meaning of section 12 (1) (*a*) of the Act of 1920, and no gloss should be added unless there are necessary and compelling reasons. *Signy's* case[12] simply decides that a furnished letting is ignored for the purposes of fixing standard rent. It was not held in that case that a furnished tenancy takes the premises outside the Acts, nor does *Prout* v. *Hunter*,[13] which deals with the protection of the tenant, not with the question of rent. *Prout* v. *Hunter*[13] was decided in 1924, when the distinction between the two was not clearly appreciated, and it is too wide in its propositions. The furnished status remains only so long as the premises are furnished and is confined to that letting only: *Mitchell* v. *Barnes* [14]; *Leslie & Co. Ld.* v. *Cumming.*[15] Further, if there were a gap in the furnished letting between 1940 and 1945, and on the evidence there may have been, the unfurnished 1940 letting would immediately have become operative. If the landlords' argument were right, then the unlawful subtenancy in *Edgware Estates Ld.* v. *Coblentz* [16] would have prevented the court looking at the superior tenancy.

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[3] [1922] 1 K.B. 1; 37 T.L.R. 827.

[4] [1944] K.B. 449; 60 T.L.R. 272: [1944] 1 All E.R. 448.

[5] [1947] K.B. 221; 63 T.L.R. 1; [1946] 2 All E.R. 678.

[6] [1949] 2 K.B. 717; 65 T.L.R. 592; [1949] 2 All E.R. 526.

[7] [1928] 2 K.B. 486; 44 T.L.R. 460.

[8] [1924] 2 K.B. 736; 40 T.L.R. 868.

[9] [1950] 1 K.B. 455; [1949] 2 All E.R. 868.

[10] [1951] 1 K.B. 648; [1951] 1 T.L.R. 82; [1951] 1 All E.R. 152.

[11] [1947] 1 All E.R. 295.

[12] [1944] K.B. 449; 60 T.L.R. 272; [1944] 1 All E.R. 448.

[13] [1924] 2 K.B. 736; 40 T.L.R. 868.

The 1940 letting was the letting of a dwelling-house and not the mere assignment of the right to receive rents. C. W. B. Finance Co. Ld. would have been entitled to possession if one of the tenants had left, and the letting should therefore not be regarded as a mere business transaction. Nor was the letting a business letting: *Prout* v. *Hunter* [17]; *Ebner* v. *Lascelles* [18]; *Carter* v. *S. U. Carburetter Co. Ld.*[19] [Reference was also made to *Knightsbridge Estates Trust Ld.* v. *Deeley* [20]; *Brown* v. *Brash* [21]; *Insall* v. *Nottingham Corporation* [22]; *Davies* v. *Warwick* [23]; *Chamberlain* v. *Farr*,[24] and *Callaghan* v. *Bristowe.*[25]]

DENNING L.J. The question is: what is the standard rent of No. 71, Ivor Court, Regents Park? It is one of a block of flats which was built about 1936. At first the owners, Knight & Co. Ld., let it furnished at a rent of £125 a year. Next it was let furnished at £3 13s. 6d. a week, that is, about £190 a year. Whilst it was so let a transaction took place in 1940 which is of much importance. Knight & Co. Ld. granted to a company called C. W. B. Finance Co. Ld. a lease unfurnished of the flat. This company was closely associated with Knight & Co. Ld. A family named Black was in control of both companies and they had common directors. The lease to C. W. B. Finance Co. Ld. was a separate lease of No. 71. (There were similar leases for other flats in the building.) It was a lease unfurnished at a rent of

[14] [1950] 1 K.B. 448; 65 T.L.R. 734; [1949] 2 All E.R. 719.

[15] [1926] 2 K.B. 417; 42 T.L.R. 504.

[16] [1949] 2 K.B. 717; 65 T.L.R. 592; [1949] 2 All E.R. 526.

[17] [1924] 2 K.B. 736; 40 T.L.R. 868.

[18] [1928] 2 K.B. 486; 44 T.L.R. 460.

[19] [1942] 2 K.B. 288; 58 T.L.R. 348; [1942] 2 All E.R. 228.

[20] [1950] 2 K.B. 228; 66 T.L.R. (Pt. 1) 867; [1950] 1 All E.R. 577.

[21] [1948] 2 K.B. 247; 64 T.L.R. 266; [1948] 1 All E.R. 922.

[22] [1949] 1 K.B. 261; 64 T.L.R. 617; [1948] 2 All E.R. 232.

[23] [1943] K.B. 329; [1943] 1 All E.R. 309.

[24] [1942] 2 All E.R. 567.

[25] (1920) 36 T.L.R. 841.

£115 (£110 plus £5 for electricity) for five years from September 29, 1940. It was made with the benefit of the existing furnished letting of the flat. C. W. B. Finance Co. Ld. bought the furniture for £150 and took the benefit of the furnished letting at £3 13s. 6d. a week. Thus there was interposed, between the owner and the furnished letting, a new lease, unfurnished, for five years at £115. The question is: what is the effect of that lease: did it create a standard rent of the flat? At some time after 1940 the furnished letting at £3 13s. 6d. a week ceased and another furnished letting was created. We know that in June of 1944 there was a furnished letting by C. W. B. Finance Co. Ld. at £6 a week. We do not know whether that letting followed straight on after the letting at £3 13s. 6d. or whether there was a gap of a week, or a year, or more, in between.

In 1945, Knight & Co. Ld. sold the freehold of the premises to the Charlton Steam Shipping Co. Ld. The shipping company bought the furniture and took over the furnished letting, and continued to let the flat furnished for a further six years. Then, in September, 1951, the shipping company let the flat unfurnished at £275 a year. The present tenant makes application to the court to determine the standard rent. He says that the standard rent is £115 fixed by the lease in 1940, whereas the company say it is £275 fixed by the letting in 1951.

[His Lordship read section 12 (1) (*a*) and (2) of the Act of 1920 and section 16 of the Act of 1933 and continued:] The first point is this: Mr. Blundell says that the lease in 1940 was not a letting of a kind which is material for ascertaining the standard rent. He recognizes that it was a real letting. It was acted upon by lessor and lessee for years. The books of the companies show that. It is not like the lease in *Conqueror Property Trust Ld.* v. *Barnes Corporation*,[1] which was a sham. But Mr. Blundell says that it was not a transaction of a kind contemplated by the Acts. It was a transaction between two associated companies of a financial nature and is no guide to rental value of the flat. He points out that a furnished letting is not material for the purposes of the standard rent: *Signy* v. *Abbey National Building Society*[2]; nor is a business letting: *Macmillan & Co. Ld.* v. *Rees*[3] and other cases. A letting under the Housing (Rural Workers) Act, 1926, is not material: *Roberts* v. *Jones.*[4] Nor, indeed, is an unlawful letting: *Edgware Estates Ld.* v. *Coblentz.*[5] Mr. Blundell says that by these decisions the courts have written a gloss upon this Act. The test is not merely to ascertain whether the house has been "let" as a dwelling. In order to determine the standard rent you have to look at the nature of the letting and see whether it is of the kind contemplated by the Acts. It must, he says, be a letting for the purposes of the Acts.

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[1] [1944] K.B. 96; 60 T.L.R. 75; [1944] 1 All E.R. 34.

[2] [1944] K.B. 449; 60 T.L.R. 272; [1944] 1 All E.R. 448.

[3] [1946] 1 All E.R. 675; 62 T.L.R. 331.

At one time in the argument I was inclined to think that the only letting which is material for fixing the standard rent is a letting to a tenant in actual occupation. There are observations in *Prout* v. *Hunter*[6] by Scrutton L.J. and Sargant J. which support that view. But on reflection I do not think it is correct. Undoubtedly, in the vast majority of cases, the courts consider only the letting to the tenant in actual occupation: and the rent at which it is let to him unfurnished becomes the standard rent. Indeed, where there are two competing tenancies, a head lease and a sublease, both unfurnished, the standard rent is fixed by the rent payable by the tenant in occupation: *Glossop* v. *Ashley.*[7] But I do not think that the standard rent is always to be fixed by reference to the tenant in occupation. In *Edgware Estates Ld.* v. *Coblentz*[8] the standard rent was not so fixed. The unlawful subletting at £225 a year was ignored: so was the previous lawful subletting at £225 a year. The standard rent was fixed by the £300 a year payable in 1939 under the head lease. So here, the furnished subletting at £3 13s. 6d. must be ignored, and we are left with a head lease in 1940 at £115 a year unfurnished. This letting comes within the very words of the Act and I do not think that we should write a further gloss upon the Act so as to ignore it. Test it this way: suppose that these premises had not been sold by Knight & Co. Ld. to the present landlords, and that Knight & Co. Ld. were the respondents to this application. I cannot imagine any court allowing them to say that the £115 was not the standard rent fixed by their letting. I may add that the £115 seems to have been genuinely fixed in 1940 in accordance with the market values at the time. The rateable value was £38 and the furnished rent £190. £115 falls fairly in between.

Mr. Blundell's second point was this: inasmuch as the flat was let furnished to an occupying tenant in 1940 it was by that very fact taken out of the Act for all purposes: and the superior lease to C. W. B. Finance Co. Ld. could not therefore give the standard rent. It seems to me, however, that whilst the furnished letting takes the flat out of the Act so far as eviction is concerned, *Prout* v. *Hunter*,[9] it does not take it out of the Act so far as standard rent is concerned. The furnished letting does not give the standard rent, but a superior letting unfurnished may do so.

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[4] [1947] K.B. 221; 63 T.L.R. 1; [1946] 2 All E.R. 678.

[5] [1949] 2 K.B. 717; 65 T.L.R. 592; [1949] 2 All E.R. 526.

[6] [1924] 2 K.B. 736, 744, 755; 40 T.L.R. 868.

[7] [1922] 1 K.B. 1; 37 T.L.R. 827.

[8] [1949] 2 K.B. 717.

Mr. Blundell's third point was that the lease in 1940 was in its nature a letting for business purposes. It was a business transaction not within the Acts. I cannot agree. The lease was a letting of a dwelling-house as a separate dwelling, and it is not deprived of that character simply because the lessee was a limited company who could only occupy by servants or agents or by subtenants. This is in accord with the view expressed by Bailhache J. in *Prout* v. *Hunter*,[10] by Charles J. in *Ebner* v. *Lascelles*,[11] and it is implicit in *Carter* v. *S. U. Carburetter Co. Ld.*[12]

In my judgment, therefore, Mr. Blundell's three points all fail. Despite his able argument, I find myself in agreement with the county court judge and the registrar, and the appeal must be dismissed.

BIRKETT L.J. I agree. Mr. Blundell said that the 1940 letting was not one to which the court should have regard when confronted with this problem of fixing the standard rent. With regard to the other points, Mr. Blundell's submission was that there was a furnished tenancy which made the agreement of no effect so far as fixing the standard rent was concerned. He also submitted that it was a business arrangement. With those two matters I do not propose to deal.

[His Lordship stated the facts of the letting of September 29, 1940, and continued:] The two matters to which I desire to draw attention are these: first, Mr. Blundell, who appeared before the registrar and before the county court judge, from the very beginning said that this was a real agreement: it was not a sham. I think that the detail about the £5 for electricity is not unimportant in view of the contentions which have been put before us. £5 for electricity is put down separately, making the £110 up to £115. It looks as though there was some careful consideration of the terms of this lease. Those two things together prima facie make it an ordinary unfurnished letting of the premises. But Mr. Blundell says that although it may look like that, it really is not so. The courts during the years that the Rent Acts have been under discussion have admittedly added certain glosses to the language of section 12 (1) (*a*) of the Act of 1920. Mr. Blundell, therefore, says that you cannot take simple words like this and say "standard rent" means the rent at which the dwelling-house is let on September 1, 1939, or, in the case of a dwelling-house which was first let after September 1, 1939, the rent at which it was first let. You cannot take the words in their simplicity and say: "Here in "1940 was the first unfurnished letting. That was at £110, or "£115 if you include the electricity. Therefore, applying the "simple plain words of this section you need inquire no further." He said that you cannot do that because the courts have added to the simplicity of this language all sorts of glosses about furnished premises and so on. Therefore, you have to look and see what the real nature of the transaction was. Was it a letting which you could properly say fixed the standard rent? The trouble is that the information about the letting is so sparse. Mr. Blundell submitted that this was a business transaction only: the idea was to give to C. W. B. Finance Co. Ld. a right to deal with this furnished tenancy which had been in existence all through and at the very time when this agreement of 1940 was made. He said that that was what the purpose was, but it is by no means certain that it was. There was a furnished tenancy in 1940. We know that there was a furnished tenancy at a much later date, but with regard to many of the intervening years we have no information at all. It is in that state of affairs that one is compelled to examine the language of the statute, the various glosses which have been put upon it and the submissions made by Mr. Blundell.

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[9] [1924] 2 K.B. 736.

[10] Ibid.

[11] [1928] 2 K.B. 486; 44 T.L.R. 460.

[12] [1942] 2 K.B. 288; 58 T.L.R. 348; [1942] 2 All E.R. 228.

In *Insall* v. *Nottingham Corporation*,[13] Tucker L.J., after citing a long passage from Lord Greene M.R. in *Chamberlain* v. *Farr*,[14] said: "Those authorities, I think, strongly support the view "that, provided that there is a rent which is a real one and not a "sham, the fact that it does not come up to the true economic

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[13] [1949] 1 K.B. 261, 272; 64 T.L.R. 617; [1948] 2 All E.R. 232.

[14] [1942] 2 All E.R. 567.

"rent which might be recovered for the premises, or the fact "that it has been reduced for family reasons or preference for "a particular tenant, is a matter which must be excluded from "the purview of the court in fixing the standard rent." Here it would appear, as a matter of fact, if one examines the nature of the furnished tenancies, that the rent of £110 was somewhere in the neighbourhood of what was a reasonable and fair economic rent. But that being an irrelevant circumstance, one has to look at the matter in this way: here was the agreement of 1940, admittedly a real agreement and not a sham. That fixes the unfurnished rent at £110 a year, and having regard to the language of the section and all the authorities which have been cited to us, I can see no reason why the decision of the registrar and the county court judge ought not to be supported. Therefore I, too, am in favour of dismissing this appeal.

PARKER L.J. I have reached the same conclusion and agree so entirely with both judgments that I do not think that I can usefully add anything.

Appeal dismissed.

Solicitors: *J. F. Coules & Co.; T. F. Peacock, Fisher, Chavasse & O'Meara.*

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[Plaint No. K.O. 1435.]

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Landlord and Tenant—Rent restriction—Premium—Rent reduced below standard rent—Lump sum payment representing discounted balance of rent—Whether payment recoverable—Premium "required" as "a condition of the granting" of a lease—Meaning—Extrinsic evidence of intention of parties—Admissibility—Landlord and Tenant (Rent Control) Act, 1949 (12 & 13 *Geo.* 6, *c.* 40), *ss.* 2, 18.
Contract—Construction—Extrinsic evidence.

In August, 1952, negotiations were entered into by the parties for the letting by the landlord to the tenant of a flat, within the Rent Acts, the standard rent of which was £263 10s. a year. The tenant did not wish to pay so high a rent, preferring to pay a lump sum and a lower rent. The landlord agreed to grant to the tenant a 14 years' lease of the flat at an annual rent of £190 and the payment of a sum of £850, described in the negotiations as

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"commuted rent," which represented the balance of the standard rent for the term agreed, less a discount for payment in advance. The terms of this agreement were incorporated in an underlease dated November 4, 1952, which was expressed to be granted "in "consideration of the sum of £850" and of the rent thereby reserved of £190. The tenant claimed repayment of the sum of £850 which she had paid, on the ground that it was a "premium" within section 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949:—

Held, (1) that the claim of the tenant to recover the £850 did not fall to be determined solely according to the terms of the lease and that extrinsic evidence of the intention of the parties was admissible.

(2) That it was an essential feature of a premium made unlawful by section 2 (1) of the Act of 1949 that it should have been "required as a condition of the grant" of the lease; the tenant had failed to establish that the landlord had "required" payment of the £850 as "a condition" of granting the lease and, accordingly, her claim failed.

King v. *Earl Cadogan* [1915] 3 K.B. 485 considered.

Regor Estates Ld. v. *Wright* [1951] 1 K.B. 689; [1951] 1 T.L.R. 242; [1951] 1 All E.R. 219 distinguished.

Per Romer L.J. If a landlord required payment of a lump sum in advance as a condition of granting a lease, such payment might well be a premium within section 2 (1) of the Act of 1949 notwithstanding that, if it were added to the rent reserved by the lease eo nomine and spread over the demised term, it would not exceed the standard rent for the period.

Appeal from Judge Reid sitting at the West London County Court.

In 1952 the plaintiff, Mrs. Madeline Woods, entered into negotiations for the grant to her by the defendant, James Andrew Wise, of an underlease of flat No. 4 at 5, Cornwall Gardens, Kensington. The premises were within the Rent Acts, having a standard rent of £263 10s. The plaintiff did not wish to pay so large a rent, but was prepared to pay a lesser rent and a lump sum by way of commuted rent. After some negotiations and correspondence, fully set out in the judgment of Evershed M.R., the plaintiff agreed to pay a lump sum of £850 and to take an underlease of the premises at a rent of £190 a year.

The underlease giving effect to that agreement was dated November 4, 1952, and was expressed to be made between the defendant, defined as the landlord, "which expression shall "where the context so admits include the person for the time "being entitled to the reversion immediately expectant on the "determination of the term of the one part," and the plaintiff,

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thereinafter called "the tenant," with a similar expanding definition.

The first clause provided: "In consideration of the sum of "£850 paid by the tenant to the landlord on or before the "execution hereof (the receipt of which said sum the landlord "hereby acknowledges) and of the rent and covenants by the "tenant hereafter reserved and contained the landlord hereby "demises to the tenant," and then followed the description of the premises, with certain exceptions and reservations, and the habendum was "To hold the demised premises unto the tenant "for the term of 14 years from the 1st day of November, 1952 "(determinable nevertheless as hereinafter mentioned) paying "therefor yearly during the said term the rent of £190 by "equal quarterly payments. . . ."

Clause (2) contained the tenant's covenants, of which No. (1) was: "To pay the rents on the days and in the manner afore-"said," the word "rents" was in the plural. No. (15) was: "Not to assign underlet or part with the possession "of the said premises or any part thereof for all or any "part of the said term without first giving one month's "previous notice in writing to the landlord and offering to "surrender to the landlord the said premises and in the event "of the landlord giving notice in writing to the tenant within "four weeks of the service of any such notice by the tenant "of his desire to take a surrender of the said premises the "tenant will forthwith surrender the said premises to the land-"lord or as he may direct In the event of the landlord taking "a surrender of the said lease at any time he shall upon "completion of such surrender repay to the tenant such portion "of the said £850 paid hereunder by the tenant calculated on "the basis that the said £850 so paid as aforesaid was com-"muted rent covering a period of 14 years so that for each year "of the term re-assigned to the landlord shall render the land-"lord liable to repay to the tenant the sum of £60 14s. 3d." A proviso followed to take effect in the event of the landlord not choosing to accept a surrender. Clause 3 contained the landlord's covenants, and paragraph (2) provided "That the "tenant paying the rents"—again plural—"hereby reserved "and performing and observing the several covenants . . ." should peaceably enjoy the premises. Clause 4 (3) provided: "If "either party shall desire to determine the term hereby created "at the expiration of the seventh year and shall give to the

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"other party six months' previous notice in writing of such "his desire then immediately on the expiration of such seventh "year the present demise and everything herein contained shall "cease and be void but without prejudice to the rights and "remedies of either party against the other in respect of any "antecedent claim or breach of covenant."

In these proceedings the plaintiff claimed repayment of the sum of £850, which she had paid on the granting of the underlease, on the ground that it was a premium within the meaning of section 2 of the Landlord and Tenant (Rent Control) Act, 1949.[1]

The defendant denied that the sum of £850 was a premium, contending that it was commuted rent. He had, since the grant of the underlease, sold his headlease of the premises to a Mr. and Mrs. Thompson, and he counterclaimed against them to have the underlease rectified.

The county court judge dismissed the action and the counterclaim.

The plaintiff appealed and the defendant appealed against the dismissal of his counterclaim for rectification.

W. A. Fearnley-Whittingstall Q.C. and *S. N. Bernstein* for the plaintiff. On the facts as found by the judge the sum of £850 paid by the plaintiff was a premium and is recoverable from

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[1] Landlord and Tenant (Rent Control) Act, 1949, s. 2: "(1) A "person shall not, as a condition of "the grant, renewal or continuance "of a tenancy to which this section "applies, require the payment of any "premium in addition to the rent. "(2) Subject to the provisions of "Part II of the First Schedule to "this Act, a person shall not, as a "condition of the assignment of a "tenancy to which this section "applies, require the payment of any "premium. (3) This section applies "to any tenancy of a dwelling-house, "being a tenancy to which the principal Acts apply, such that when "the dwelling-house is let under the "tenancy it is a dwelling-house to "which the principal Acts apply. . . . "(5) Where, under an agreement "made after March 25, 1949, any "premium has been paid which, or "the whole of which, could not lawfully be required under the foregoing provisions of this section . . . "the amount of the premium . . . "shall be recoverable by the person "by whom it was paid. (6) A person "requiring any premium in contravention of this section shall be "liable on summary conviction to a "fine not exceeding £100, and the "court by which he is convicted may "order the amount of the premium, "or so much thereof as cannot lawfully be required under this section, "to be repaid to the person by whom "it was paid. (7) Section 8 of the "Increase of Rent and Mortgage "Interest (Restrictions) Act, 1920, is "hereby repealed. . . ."

S. 18 (2): "In this Act . . . the "expression 'premium' includes any "fine or other like sum and any "other pecuniary consideration in "addition to rent."

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the defendant under section 2 (5) of the Act of 1949. Any lump sum payment in advance of commuted rent is a premium: *King* v. *Earl Cadogan* [2]; *City Permanent Building Society* v. *Miller*.[3] The fact that the payment was a premium appears on the face of the underlease. This payment is within the definition of "premium" in section 18 of the Act of 1949: *O'Connor* v. *Hume*.[4] If one goes behind the terms of the lease, the onus is on the defendant to prove that the payment was not a premium. The fact that this payment is described as commuted rent does not prevent it being a premium. The question is what was the actual bargain between the parties, not what they said it was or thought it was. The stamp on the lease shows that the sum of £850 was not considered as rent but that it was a separate consideration.

S. N. Bernstein following. If the test is whether the landlord receives in full more than the standard rent, then it is submitted that he in fact got more under the lease than the standard rent. The rent of £263 was not the standard rent; that sum included payment for services. The tenant was entitled to go to the rent tribunal to have the rent fixed and, until that was done, the amount of the standard rent was not known. This scheme is an evasion of the Act and within the mischief at which it is aimed. [Megarry's Rent Acts, 7th ed., p. 368, n. 46, was referred to.]

M. Ahern for the defendant. The first question here is whether the county court judge was entitled to look behind the underlease to see the intention of the parties. The decision of the Court of Appeal in *Regor Estates Ld.* v. *Wright* [5] is authority for the proposition that the court can look at extrinsic evidence to see what is the true bargain when considering the effect of a lease of premises within the Rent Acts. The court has consistently done so: see the observations of Jenkins L.J. in *Colton* v. *Becollda Property Investments Ld.*[6] In any proceedings under the Act of 1949 relating to the underlease its terms are not conclusive. They are merely some evidence of the matters which require to be proved to bring the case within the section. If this were not so, the defendant might be proved to have committed a criminal offence on the terms of the underlease alone. Evidence must be admissible to show whether a premium was in fact paid.

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[2] [1915] 3 K.B. 485.

[3] [1952] Ch. 480; [1952] 2 T.L.R. 547; [1952] 2 All E.R. 621.

[4] [1954] 1 W.L.R. 824; [1954] 2 All E.R. 301.

[5] [1951] 1 K.B. 689; [1951] 1 T.L.R. 242; [1951] 1 All E.R. 219.

[6] [1950] 1 K.B. 216.

The second question is whether the sum of £263 10s. is in fact the standard rent of these premises. It is submitted that, on the facts, it is the standard rent: *Samuel* v. *Salmon & Gluckstein Ld.*[7]

The third question is whether the sum of £850 is repayable under the provisions of the Act of 1949. The decision of the county court judge that this was commuted rent is a finding of fact which should not be disturbed. In the Act of 1949 "rent" and "premium" are mutually exclusive terms. "Premium" is defined in section 18 as a pecuniary consideration in addition to rent. Reading sections 2 and 18 together, rent and premiums are distinct from each other. In section 1 (2) of the Act of 1915, the predecessor of section 2 (1) of the Act of 1949, it is provided that a person shall not "in consideration of" the grant of a tenancy require the payment of a premium. In section 2 (1) the wording has been changed and a landlord is not to require a premium as "the condition" of granting a tenancy. Having regard to clause 2 (15) of the underlease, which provides for the repayment of a proportionate part of the sum of £850 if the lease is surrendered pursuant to the provisions of the clause, the payment is not a premium. If the lease determines pursuant to clause 4 (3) the position is more difficult. For the plaintiff to succeed she must establish: (1) that the payment of a premium was a "condition" of the granting of the lease, and (2) that its payment was "required" by the defendant. On the facts it is clear that the payment was not a "condition" of the grant nor was it "required." "Rent" means the payment for the use and enjoyment of the dwelling-house. Rent having been commuted still remains rent. The decisions in *Rush* v. *Matthews*[8]; *Property Holding Co. Ld.* v. *Clark*[9]; *Alliance Property Co. Ld.* v. *Shaffer*,[10] and *Sidney Trading Co. Ld.* v. *Finsbury Borough Council*[11] show what is meant by rent. There is a distinction between the meaning attached to the word "rent" when used by conveyancers and its meaning in the Rent Acts. There is a similar distinction between the meaning of the word "premium" in the Rent Acts and its meaning in ordinary use by conveyancers. It is hard to see what difference there is between commuted rent

[7] [1946] Ch. 8; 62 T.L.R. 28; [1945] 2 All E.R. 520.

[8] [1926] 1 K.B. 492; 42 T.L.R. 287.

[9] [1948] 1 K.B. 630; 64 T.L.R. 76; [1948] 1 All E.R. 165.

[10] [1949] 1 K.B. 367; 65 T.L.R. 111; [1949] 1 All E.R. 312.

[11] [1952] 1 All E.R. 460; [1952] 1 T.L.R. 512.

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and rent payable in advance. If commuted rent is a premium rent paid in advance is also a premium.

"Premium" has a special meaning in the Rent Acts and commuted rent is not within it. In order to say whether any particular payment is a premium for the purposes of the Act it is necessary to see what is the nature of the payment in fact. This arrangement here was merely a collateral agreement for the reduction of rent. *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Phillipe* [12]; *Rex* v. *Barnet (and Area) Rent Tribunal, Ex parte Millman*,[13] and *Rex* v. *Birmingham (West) Rent Tribunal, Ex parte Edgbaston Investment Trust Ld.*[14] show that section 18 should not be construed strictly.

Finally, if the payment was a premium, in order to recover the plaintiff must show that the defendant regarded the payment as a "condition" of the grant of the lease. Subsection (5) of section 2 only relates to premiums which are unlawful. This is a penal statute and should be strictly construed.

With regard to the counterclaim; there is evidence that both parties intended that this payment should be commuted rent and the defendant is entitled to have the underlease rectified to give effect to that common intention: *King* v. *Cadogan* [15]; *Hall* v. *Booth*,[16] and *Remmington* v. *Larchin.*[17]

W. A. Fearnley-Whittingstall Q.C. in reply. The payment made by the plaintiff was wrongly called commuted rent. The effect of the transaction was to turn part of the 14 years' rent into a capital sum. That is within the mischief at which the Act is aimed. The object of the Act is to prevent tenants jumping the queue by paying a premium. A premium is defined as a payment in addition to rent. This payment is within that definition. The payment having been agreed, it follows that the payment was a condition of the grant and that it was required by the defendant. The plaintiff is entitled to recover the £850. [Reference was made to *Property Holding Co. Ld.* v. *Clark.*[18]]

David H. Wild for the defendants to the counterclaim was not called on to argue.

Cur. adv. vult.

1955. March 2. The following judgments were read.

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[12] [1950] 2 All E.R. 211.

[13] [1950] 2 K.B. 506; [1950] 2 All E.R. 216; 66 T.L.R. (Pt. 1) 1232.

[14] [1951] 2 K.B. 54; [1951] 1 All E.R. 198.

[15] [1915] 1 K.B. 821.

[16] [1930] 1 K.B. 381.

[17] [1921] 3 K.B. 404; 37 T.L.R. 839.

[18] [1948] 1 K.B. 630.

EVERSHED M.R. This is an appeal from a judgment of His Honour Judge Reid, who dismissed the plaintiff's action to recover a sum of £850, and also dismissed the defendant's counterclaim for rectification of an underlease dated November 4, 1952. The underlease was granted by the defendant to the plaintiff for a term of 14 years (determinable as therein provided) in premises known as Flat No. 4 at 5, Cornwall Gardens, Kensington. Admittedly, the premises are a dwelling-house within the Rent Restriction legislation. The plaintiff's claim to recover £850 (which was expressed, as will hereafter appear, as part of the consideration for the demise) is based on an allegation of it being a "premium" within the meaning of section 2 of the Landlord and Tenant (Rent Control) Act, 1949, and the definition section, section 18, of the same Act. If the £850 was in truth such a premium, then it is recoverable by virtue of section 2 (5) of the same Act.

To dispose first of one point, the judge said that, if he had decided for the plaintiff, he would have given judgment for half the sum claimed only, namely, £425, on the ground that the plaintiff herself had only, in fact, provided such half.

The relevant facts are that a Mr. Boggis, who was a friend of the plaintiff, gave to her, or advanced to her, £425 for the purpose of its being applied in or towards payment of the £850; but the whole £850 received by the defendant from the plaintiff was paid, in fact, by a cheque drawn by the plaintiff, after certain deductions in respect of matters of account between them. So far as Mr. Boggis came at any stage into contact with the defendant, he was acting as the plaintiff's agent in any event, and, the whole sum of £850 in suit was paid by the plaintiff to the defendant, who gave her a receipt therefor. The deed itself, further, so records, and the defendant would appear to be bound by the deed. I therefore differ on this point from the judge. If the plaintiff succeeds in the action she can, in my judgment, succeed for the whole sum of £850.

[His Lordship read the relevant portions of the underlease and of the Landlord and Tenant (Rent Control) Act, 1949, and continued:] It will be noted that the vital subsection (1) of section 2 speaks of a premium being "required" by the landlord "as a condition" of the grant of a tenancy. In that respect, the Act of 1949 follows section 8 (1) of the Act of 1920 which was, by the Act of 1949, repealed. That section read as follows, and it combined, in effect, the terms of subsection (1) of section 2 of the present Act and the definition in section 18:

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"A person shall not, as a condition of the grant, renewal, or "continuance of a tenancy or subtenancy of any dwelling-house "to which this Act applies, require the payment of any fine, "premium, or other like sum, or the giving of any pecuniary "consideration, in addition to the rent, and, where any such "payment or consideration has been made or given in respect "of any such dwelling-house under an agreement made after "the 25th March, 1920, the amount or value thereof shall be "recoverable," etc.; and subsection (2) of that section imposed the criminal liability now to be found in subsection (6) of section 2 of the present Act.

The Act of 1920 substantially changed the form of the language which had previously been used in dealing with this problem. I turn to section 1 (2) of the Act of 1915 which provided: "A person shall not in consideration of the grant, "renewal, or continuance of a tenancy . . . require the payment "of any fine, premium, or other like sum," and went on to provide that such a sum should be recoverable. It will be observed that there was a change from "consideration" to "condition" and in the imposition in the Act of 1920 of criminal liability for infringement of the prohibition.

I now turn to the conclusion of the judge in this case, which was that the sum of £850, paid as recorded in the underlease, was outside the scope of the Act, because the £850 was in truth not a premium at all but part of the rent expressed and recovered, as the judge observed, "in rather abnormal form."

I will read certain passages from the judgment. Thus: the judge said: "In the result I conclude that the defendant thought "throughout, rightly or wrongly, that the standard rent of the "flat was £263 10s. He thought therefore that if he let for "14 years he would be entitled to collect in all 14 times that "amount, and further that he could take some of that rent in "advance, so that if he let at a yearly rent of £190 he could "take by way of rent in advance 14 times £73 10s. That "amounts to £1,029, so that if he let for £190 a year he had "something over £1,000, so to speak, to turn round on."

After referring to the fact that he was sure the defendant was alive to the advantage of collecting some rent in advance, the judge went on: "I think that he had no intention of getting "more from the flat than the Rent Acts allowed him to take but "that he thought that, by approaching the matter in the way I "have described, he was keeping on the right side of the law."

Later the judge said: "I think that I must endeavour to

" determine, without any assistance from the meaning of the " term ' rent,' whether the £850 here falls within the mischief " of the Act as a premium. So far as the general policy of " the Acts is concerned the material sections replace and extend " corresponding provisions of the Act of 1915, section 1, and of " the Act of 1920, section 8, and I think it plain that what " Parliament has been trying to do is to protect tenants under " conditions of housing shortage against the rapacity of landlords. I do not think Parliament intended to expose landlords " to the rapacity of tenants, and the real crux seems to me " to be whether in any given case of doubt the landlord is " seeking to make out of the tenant more than the Rent Acts " allow him to take. I am fortified in this view by observing " that a landlord, who requires a premium, exposes himself to " criminal proceedings. This is rather a border-line case. I " am satisfied that the landlord here was not endeavouring to " obtain from the tenant more than the Acts allowed, but that " he was trying to obtain that amount in a rather abnormal " form. Of course if he had been so ill advised as to describe " the £850 as a premium, or as a fine or as other pecuniary " consideration in addition to rent, he would have brought himself within the mischief of the Act of 1949, section 2. But " he did not do that. The £850 is simply described as a sum, " and in clause 2 (15) of the underlease part of the sum is " made in certain circumstances repayable on the basis that it " is commuted rent. In my judgment it escapes (but only just) " from the section . . . I think that commuted rent, which " is what the payment here was, remains a payment in the " nature of rent, though it is, so to say, capitalized, and since " it remains in the nature of rent, it is rent and not a premium " which is demanded."

It appears reasonably clear (apart, at any rate, from the effect of clause 4 (3) of the underlease) that, on the judge's finding, the transaction was not the sort of thing at which the legislation really aimed; that is by getting some further consideration for the demise over and above the permitted rent. Nevertheless, the question is one of the meaning of the Act. Was this sum a premium of the character made recoverable by the Act?

The point as stated is really a short one, though I have found it difficult, and it has led to no little argument. The plaintiff, appellant here, says: " Whatever was in the defendant's mind, and however the sum was arrived at, according "to the ordinary sense of the bargain as expressed in the "underlease, and also according to the evidence and the judge's "findings, the £850 was a 'premium,' and a premium which "the defendant required as a condition of the demise. It was "something different and distinct from that which was agreed "as 'rent.' In the terms of the deed it was 'commuted rent'; "that is, something pro tanto substituted for rent." The defendant respondent, on the other hand, says: "No; the "terms of the deed and the evidence—particularly the contemporary correspondence—and the finding show that the £850 "was not a premium or fine or some consideration over and "above rent, but was essentially part of the rent quantified "as such and satisfied in a particular way. Accordingly, if it "still retained the essential attributes of rent, it would not be "a premium. In any case it was not required by the defendant "as a condition of the grant."

There was a good deal of discussion of the question whether it was permissible for the court to hear extrinsic evidence of the bargain made, or whether the court in this matter was confined to the deed. It is convenient for me to deal first with that point, and I conclude that extrinsic evidence was clearly admissible, though the result of so concluding is far from decisive of the case. I note that this is not an action on the deed; the question here is whether the plaintiff has a statutory right of action under section 2 (5) of the Act of 1949. Moreover, if she has, then prima facie the defendant has done that which was illegal, and for which he is liable to criminal proceedings. As a matter of principle, therefore, evidence must be admissible to prove the true nature of the transaction; but, further, the evidence is required not to vary the deed, but with a view to explaining and proving what was in truth the consideration. For this purpose extrinsic evidence has always been admissible.

In Norton on Deeds, 2nd ed., p. 219, the principle is thus stated: "If the consideration is stated inaccurately, or is not "stated at all, or if part only of the consideration is stated, "evidence is admissible to prove the true consideration, so as "it be not inconsistent with the consideration stated in the "deed." That matter was also dealt with by my brother Romer in the case in this court of *O'Connor* v. *Hume*,[1] a passage which was cited to us in argument, and which is as follows: "I am

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[1] [1954] 1 W.L.R. 824, 830; [1954] 2 All E.R. 301.

"satisfied that the court has no right to resort to correspondence "and oral evidence for the purpose of striking out, for that is "what it comes to, an important provision which the parties "agreed upon and expressed in the agreement. The general rule "with regard to extrinsic evidence is that such evidence is not "admissible to add to, vary, modify, or contradict a written "instrument."

I refer also to a case in this court of *Regor Estates Ld.* v. *Wright*,[2] and, since this case also has some bearing upon a later part of my judgment, I will read two passages from the leading judgment of Cohen L.J. That was a case in which a premium had been charged on the grant of a tenancy at a time when, in the circumstances of the case, the lease being for a term of years, the requirement of a premium was not unlawful. The question in that case was whether, in the events which had later happened, the action by the landlord for payment of one of the instalments of the premium was an unlawful demanding or requirement of a premium for the continuance of the tenancy, and the court, among other things, considered the argument put forward by the tenant that, although this sum in question had been expressed as a premium, it was in truth a disguised part of the rent and, as such, in excess of the recoverable standard rent. The relevance for present purposes of that argument is obvious. The Lord Justice said[3]: "Looking at the lease in the present "case purely by itself, for the reasons which I have given I "should come to the conclusion that it was an agreement for the "payment of a premium so far as the £360 was concerned and "not an agreement for the payment of additional rent. But in "considering a matter of this class and the effect of a document "relating to the Rent Restriction Acts, we are not confined "to the terms of the document, and we are bound to look at "the transaction as a whole and consider whether it is within "the prohibition of the Acts. In a different connexion "Uthwatt J. made some observations in *Samuel* v. *Salmon & "Gluckstein Ld.*,[4] to which Mr. Pearl referred. Uthwatt J. "makes it clear that we are not bound by the vocabulary which "the parties have chosen to use. In that particular case he "held that the premium was rent."

The Lord Justice then cited a passage from Uthwatt J.'s judgment, and then went on (and this is the second passage that I will read): "Mr. Pearl also referred to *Rush* v. *Matthews*,[5] "where the parties had plainly attempted to evade the Act by "providing for weekly payments and calling them premiums in "a separate document. On the facts of that case the court "had no hesitation in coming to the conclusion that it was a "pure evasion of the Act and was within the mischief aimed "at by the Act. and, therefore, that the premium could not be "enforced." I conclude, therefore, that the judge was right to admit evidence in this case, but, as I have indicated, the difficulties of it are by no means at an end.

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[2] [1951] 1 K.B. 689; [1951] 1 All E.R. 219; [1951] 1 T.L.R. 242.

[3] [1951] 1 K.B. 689, 698.

[4] [1946] Ch. 8; [1945] 2 All E.R. 520; 62 T.L.R. 28.

I must now refer back to the judge's summary of the evidence. For the sake of brevity I will take a limited number of extracts: "The defendant said he told Mrs. Woods that the "rent was £263 10s. a year for a 14-year lease. She said she "would like a flat at a lower rent as she did not want so large "a yearly commitment. She asked if she took a lease for "14 years whether she could pay a sum of commuted rent so "that her annual rent would be about £200. The defendant "said he would think it over. He did, and then rang her up "and said that if she was taking a lease for 14 years and wanted "to pay a rent of about £200, the balance would come to £1,000 "over £190 a year."

I can go to the judge's summary of the plaintiff's evidence: "The plaintiff said that the defendant started negotiations by "telling her that the rent was £150 and £50 rates and that "she must pay £1,000 key money. She said she hadn't got "£1,000 but would go and see the flat. This she did and said "that she liked it and would make an offer. Next she and "Mr. Boggis saw the defendant at the flat. They offered him "£250 each and after some hard bargaining settled at £850. "Later the plaintiff and Mr. Boggis went to the defendant's "flat when the plaintiff tried to get the defendant to take off "the £850 an amount of £148 which the defendant's wife owed "the plaintiff and succeeded to the extent of £100. That was "the plaintiff's account of the matter." It is clear that there was an acute conflict, and, further, the judge placed no particular reliance on either the plaintiff or the defendant as witnesses of truth.

"The defendant," said the judge, "called his wife as a "witness to support him, and the plaintiff called Mr. Boggis." "Of the four," said the judge, "I consider Mr. Boggis the only

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[5] [1926] 1 K.B. 75, 492; 42 T.L.R. 287.

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"reliable witness." The pity was that Mr. Boggis could only give evidence covering so little of the material ground. Of Mr. Boggis the judge said: "He knew nothing of premiums or their "illegality but was aware that the defendant was asking £190 "a year and £1,000 down. Having seen the flat he said to the "defendant 'Too much money.' The defendant showed them "out. On the doorstep Mr. Boggis said 'I'll give you £500.' "The defendant said 'No,' but the ice was broken and in a few "minutes the figure of £850 was agreed."

Finally, there is a point on which the judge naturally relied: "She (the plaintiff) had got in touch with her solicitors and Mr. "Hulkes, an experienced managing clerk, was there to represent "them. Neither the defendant's wife nor Mr. Boggis was "there, but the plaintiff was supported by Mrs. Poole, her "secretary. . . ."

I think I need not read any more except just one passage where, after referring to a letter, the judge said: "I attach a "good deal of importance to that letter. In the first place it "emanates from the plaintiff's side; in the second place it "must have been the result of the instructions received by "Mr. Hulkes at the meeting at the shop, and so shows quite "plainly that the idea of commuted rent is no afterthought "conceived only when the trouble had arisen but was already "in contemplation before the deposit was paid."

The effect of the acceptance of Mr. Boggis's evidence was limited as his participation in the transaction was limited. But that acceptance does not involve the rejection of all the defendant's evidence, for otherwise the judge must have held that the sum was a premium. For such would inevitably have been the result, if he accepted the plaintiff's story that the sum was demanded as key money. Therefore, as I construe the judge's findings, he held: (1) That the defendant regarded the £850 as a capitalized amount of part of the rent which he could lawfully demand; (2) that the actual figure of £850 represented a discounted calculation, reached by bargaining, of the full amount the defendant regarded himself as entitled to claim on account of rent; and (3) whether or not the plaintiff fully apprehended what the defendant said or had in mind, she at least understood that the £850 was "commuted rent," for in the passage to which I have just referred in the evidence her solicitor, Mr. Hulkes, got that phrase and got that idea from her. This last-mentioned view is strongly borne out by the correspondence on which, as I have said, the judge relied, and I will read three letters from it.

The first, dated October 20, 1952, is from the plaintiff's then solicitors to the solicitor for the defendant: "We have been "instructed to act for Mrs. M. Wood who is proposing to rent "an unfurnished flat from your client Mr. Wise and we shall "be glad to receive draft lease for approval at your early con"venience. Our client has already paid to yours the sum of "£85 being 10 per cent. of a sum which our client is paying to "yours by way of commuted rent and it was arranged that you "would let us have your client's receipt for this sum."

That was acknowledged, and the solicitors for the defendants wrote by letter of October 21: ". . . We note that £85 has "been paid as deposit and we will obtain a receipt from our "client." That they did, and on October 29 they wrote: "We "thank you for your letter of the 20th instant, and we now "send you herewith the draft lease with a copy for your use. "We also enclose our client's receipt for the sum of £85 in "respect of the deposit on the payment of £850 which is to be "paid at completion by way of commuted rent. The standard "rent for this flat must be taken at £263 10s. which was the "rent at which it was first let but you will find on your search "that the maximum rent at which this flat can be let as fixed "by the Kensington Borough Council is £300 per annum. . . ."

These findings of fact by the judge are, of course, conclusive. It follows, in my judgment, that if it be the fact that the plaintiff did not fully understand the nature of the £850 and the basis on which it was calculated, that is, even if she thought she was paying key money, the consequence is still not fatal to the defendant, since a recoverable premium must be a sum in fact "required" as such by the landlord. The first question, however, is, was the £850 a "premium" at all within the Act?

We were referred to *King* v. *Earl Cadogan*,[6] where Warrington L.J., in the course of his judgment, said[7]: "I need not say "anything about the meaning of the word rent, but 'premium,' "as I understand it, used as it frequently is in legal documents, "means a cash payment made to the lessor, and representing, or "supposed to represent, the capital value of the difference "between the actual rent and the best rent that might otherwise "be obtained." In that case the question at issue related to the right of a lessee of licensed premises to recover a certain amount of licence duty that was proportionate to the increased rent or premium payable in respect of the premises being let as licensed premises. It was a case in which none of the conceptions with which we are now familiar underlying the Rent Restriction Acts had any application at all. Nevertheless, the words used by the Lord Justice are in truth very wide, and, if they are applicable to this case at all, they would indubitably cover the £850 with which we are concerned.

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[6] [1915] 3 K.B. 485.

[7] Ibid. 492.

Mr. Ahern conceded that if, before the Rent Acts were ever thought of, a bargain had been made between a proposing landlord and a proposing tenant substantially of the kind and in the manner alleged by the defendant in his evidence in this case—that is, the periodic rent being reduced on terms that a lump sum were paid on or before the execution of the lease calculated so as to represent the value of the reduction in the rent originally proposed—the lump sum would naturally and properly be regarded as a "premium." But Mr. Ahern's case was that, in what may be called "Rent Act cases," the presence of special and important considerations vitally affects the matter and may produce a different result. Thus it is, in the first place, significant that Parliament has not been content to leave the word "premium" to be construed, according to its ordinary sense, as a well-known word, but has applied special words of definition: "The expres-"sion 'premium' includes any fine or other like sum and any "other pecuniary consideration in addition to rent." (See section 18 (2) of the Act of 1949.) According to Mr. Ahern, the effect and purpose of the definition are to distinguish a premium from anything which, properly speaking and for the purposes of the Rent Acts, is "rent," and to confine the meaning of premium accordingly to considerations or money payments which are not, properly speaking, "rent" or part of the "rent."

In cases under the ordinary law, unaffected by the Rent Acts, the question, how much rent should be payable under, and what other considerations there should be for, a demise were matters for free bargaining. A landlord might charge any sum that he could get for rent. If he preferred, he could charge a low rent and demand a "premium" or lump-sum payment. There was no such purpose as now exists in any attempt to disguise the one in the shape of the other. In these circumstances, the word "rent," even though not confined to the old common law meaning of that for which distress might be levied, would naturally and ordinarily be used to signify the periodic payments under a demise in contrast to lump-sum or other kinds of consideration.

The question in *King* v. *Earl Cadogan*[8] was one which arose under the Finance Act, 1912, and did not (as do the Rent Acts) involve any limit on the amount of rent which might be charged; and the language of Warrington L.J. should be read against that unrestricted background.

In the case of "rent restricted dwellings," on the other hand, it is of the essence of the matter that there is a strict limit on the amount which the landlord may lawfully charge for rent; and it is a further purpose of the Rent Acts, as Mr. Ahern emphasized, to prevent landlords avoiding the statutory prohibition on excessive rents by disguising in other forms that which is, in truth and in fact, the rent. (See, for example, the observations of this court in *Property Holding Co. Ld.* v. *Clark.*[9])

Notwithstanding these considerations, Mr. Fearnley-Whittingstall was at one time inclined to go to the length of saying that any "lump-sum" payment was a premium, even though it was shown to be nothing more than a payment of rent in advance; and he referred to *City Permanent Building Society* v. *Miller*,[10] and particularly to the judgment of Hodson L.J. in that case. In my judgment, it is in any event unnecessary, for the purposes of the present case, to go to that length. On the other side it was suggested by Mr. Ahern that, if the plaintiff was entitled to succeed in the present case, an easy way would be provided for avoiding the Rent Acts; all a landlord would have to do would be to reduce the rent to a figure below two-thirds of the rateable value of the premises and then he could charge, by way of "premium," any lump-sum figure that he liked, or could obtain, with impunity.

I cannot, for my part, think that the arm of the law would be so short as to disable it from dealing appropriately with such a case as that last suggested, if it appeared that the so-called premium was, in truth and substance, nothing more or other than the rent quantified and provided for in "an abnormal form." In *Regor Estates Ld.* v. *Wright*[11] the tenant attempted, unsuccessfully on the facts, so to establish. But where, on the facts, such a quantification of the rent was established and found, after due apportionment, to exceed the permitted rent, it seems to me that the court would have no difficulty in providing the appropriate remedy.

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[8] [1915] 3 K.B. 485.

[9] [1948] 1 K.B. 630; [1948] 1 All E.R. 165; 64 T.L.R. 76.

[10] [1952] Ch. 480; [1952] 2 T.L.R. 547; [1952] 2 All E.R. 621.

[11] [1951] 1 K.B. 689.

It is against this background, which I have thought it right to state at some length, that Mr. Ahern says that the present case must be judged; and, so judged, he says, the £850 is properly found not to have ceased to be "rent" and therefore not to be a "premium" at all within the meaning of the Act of 1949.

I have stated the nature of the argument, but it is, of course, necessary to have regard to the terms of the underlease itself; for I agree with Mr. Fearnley-Whittingstall that, whatever may have been in the minds of the two parties in arriving at the figure of £850, the terms of the deed might convert it, inevitably, into a "premium" within section 2 of the Act. The elaborate provisions of clause 2 (15) of the deed do, however, support, in my judgment, the view that, according to the substance of the matter (and in cases of this kind the court will always look at the substance of the matter) the sum of £850 was not intended to lose its quality and identity as a computation of, and provision for, part of the permitted rent.

I have already read clause 2 (15), but merely state by way of reminder that it was that clause that gave to the landlord a right, in certain circumstances, to require a surrender on terms that he then recouped a proportionate amount of the £850 described as "commuted rent." On the other hand, it is the fact that no corresponding provision was added to clause 4 (3) of the deed. This gave to either party a power to determine at the end of seven years. If there had been added to this clause words corresponding to those found in clause 2 (15), it would, as it seems to me, have been difficult for the plaintiff to deny that the sum of £850 had retained throughout its character of rent. As clause 4 (3) stands, however, it may be said—and said with great force—that in some circumstances at least the £850 has lost this character of rent; and I am not satisfied that the answer given by the judge (namely, that in the event of termination of the lease by the landlord the tenant would have remained as a statutory tenant) suffices to meet the point. On the other hand, it is plain from the extrinsic evidence—which I have already held to be admissible—that the point having been raised on the plaintiff's behalf was treated as covered by the terms of clause 2 (15).

In the inquiries before contract was this: "If the landlord is "to have the right to terminate the lease at the end of seven "years it is difficult to understand how he can also claim that "the £850 to be paid is for commuted rent on a 14-year term," to which the answer was: "Your amendment to draft lease "covers this," and that amendment was the insertion of what is now paragraph (15) of clause 2 of the provision for recoupment of the proportionate part of the £850 in the event of surrender.

The answer given, though accepted, appears to me to have been plainly inadequate. But it does not, in my judgment, follow that, if the landlord should determine the underlease in accordance with clause 4 (3), the tenant would not in all the circumstances have a valid right to a return of an appropriate part of the £850, or, at least, would not have an answer, after becoming a statutory tenant, to any attempt to increase the periodic rent above the existing figure of £190.

Mr. Fearnley-Whittingstall also in this connexion drew attention to the fact that a payment of £85 had been made by way of deposit. As to this, however, I refer to the terms of the letter written by the plaintiff's solicitor on October 20, 1952, and to the answer of October 29.

I have dealt at length with the point which was the point mainly argued before us; and upon it there is, as it seems to me, great force in Mr. Ahern's contention. But I do not find it necessary to express a conclusion upon it; for there is a further point which, in the circumstances of the case, is, to my mind, decisive in the defendant's favour. The language of section 2 (1) of the Act of 1949 is: "A person shall not, as a condition of the "grant . . . require the payment of any premium." And, as I follow subsection (5), the right of the plaintiff to recover the £850 depends upon her establishing that that sum was a premium "which could not lawfully be required" under subsection (1); that is, that it was a premium required by the defendant as a "condition" of the grant.

It will be recalled that in the short original Act of 1915—the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915—it was provided by section 1 (2) that: "A person shall "not in consideration of the grant renewal or continuance of a "tenancy of any dwelling-house to which this Act applies require "the payment of any fine 'premium' or other like sum in addition to the rent . . ." The subsection went on to provide that any such "premium" should be recoverable from the landlord. In its context in section 1 of the Act, the provision was plainly intended, in my judgment, to prevent evasion of the prohibition of unauthorized increases of rent by means of the device of a so-called "premium."

The Act of 1915 was repealed and replaced by the much more elaborate Act of 1920—the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920—in which restriction on premiums found its place in section 8. Subsection (1) of that section provided: "A person shall not, as a condition of the grant, renewal, or "continuance of a tenancy or sub-tenancy of any dwelling-house "to which this Act applies, require the payment of any fine, "premium, or other like sum, or the giving of any pecuniary "consideration, in addition to the rent, and, where any such "payment or consideration has been made or given in respect of "any such dwelling-house under an agreement made after the "twenty-fifth day of March nineteen hundred and twenty, the "amount or value thereof shall be recoverable by the person by "whom it was made or given." Subsection (2) rendered a person requiring a premium in contravention of the section liable to criminal proceedings.

It will be seen, then, that the Act of 1920 (section 8 (1) of which combines, in effect, section 2 (1) of the Act of 1949 and the definition in section 18 (2) of that Act) (*a*) for the first time made the requiring of an unauthorized premium a criminal offence; but (*b*) changed the original formula from "in con-"sideration of the grant" to "as a condition of the grant." It is true that the prohibited "requiring" covers—by the terms of section 8 (1) of the Act of 1920, and by the effect of the definition in section 18 of the 1949 Act—a pecuniary "consideration"; and see also in the case of an assignment the terms of Part II of the First Schedule to the Act. Even so, however, that which is prohibited by section 2 (1) must be required as a "condition" of the grant. In my judgment, the change of language from that in the Act of 1915 cannot be regarded as without significance. The conception of "requiring" some money payment as a "con-"dition" of the grant of a tenancy is well understood. To my mind, there is a real distinction between such a requirement as a condition precedent to the grant of a tenancy (on any terms) on the one hand, and, on the other hand, the provision in the lease or contract of tenancy for payment of some lump sum by way (as in this case) of compounding of rent and in addition to the periodic rent. It is the former, and the former only, which is prohibited and made the subject of criminal proceedings. The latter, for reasons which I have already stated, if not in truth a disguised premium required as a condition of the grant, might, at least, be properly regarded as a disguised part of the rent.

But, whatever the reasons for the change of language, the question in the present case is whether the plaintiff has proved that the payment of the £850 was "required" of her by the defendant as a "condition" of the grant of the tenancy. If the plaintiff's evidence had been accepted—that is, to the effect that the defendant required this or some similar sum as "key-money," as a condition precedent to the grant of any tenancy at all—then I should have thought she would beyond doubt be entitled to succeed; and the same would, prima facie, be true, if the £850 was arrived at as a lump sum payment without reference to, and derivation from, the permitted rent; for, in such case, the natural inference would be that the sum had in truth been required as a condition of the grant. But, as I understand the findings of the judge, the defendant agreed to the sum of £850 being inserted as part of the consideration representing a compounding of the sum of £73 10s., part of the total rent which he, at any rate, honestly believed that he could exact, and as part of an arrangement whereby the periodic rent was reduced from £263 10s. to £190 per annum. Why the arrangement took this form it is not necessary to say. It may well have arisen from the circumstance that the plaintiff was fortunate enough to have a friend who was willing to provide her with a lump sum, but who might well have been unwilling to pledge himself to payment of the whole or part of a periodic rent. However that may be, and whatever may have been in the plaintiff's mind beyond the fact that, to her, the sum represented "commuted rent," I am unable to see that the £850 has been shown by the plaintiff to have been a premium required by the defendant "as a condition of the grant."

Upon this question, as upon the question whether the sum of £850 was a "premium" at all, the terms of the underlease itself must also be considered. I do not repeat what I have already said as regards clauses 2, paragraph (15), and 4, paragraph (3), and as regards the "deposit." In my judgment, these matters do not suffice to outweigh the other considerations to which I have referred so as to produce the result that, if the £850 was a premium, it was a premium required by the landlord as a condition of the grant. In all the circumstances, therefore, I have come to the conclusion, on the special facts of this most difficult case, that the plaintiff failed to prove the facts necessary to bring her case within section 2 of the Act of 1949, and I would dismiss the appeal.

There remains the cross-appeal for rectification. According to the counterclaim, the defendant asked that the underlease should be rectified by inserting between the words "rent of" and the

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words "£190" in paragraph (1) thereof the words "£263 10s. "per annum payable as to £73 10s. thereof by a single commuted payment of £850 on or before the execution hereof being "the sum hereinbefore referred to and as to the remainder "thereof, that is to say, the sum of."

In my judgment, the answer given by the judge to this claim is conclusive. He said: "In my judgment the counterclaim "fails. The defendant's solicitor on one side, and Mr. Hulkes on "the other, gave evidence that they were satisfied with the form "of the document as executed. Neither lay client was capable "of formulating the matter as it was sought to be formulated by "the defence. The defendant has therefore failed to establish "any common intention contrary to the terms of the underlease. . . ."

It is, in my judgment, quite clear, upon the facts, that the bargain made by the plaintiff and the defendant or their respective solicitors was, in this respect, accurately represented by the underlease which they signed; and that, in any event, the defendant wholly failed to prove any different bargain in the terms claimed in his counterclaim. I shall, I hope, be forgiven for dealing thus shortly with the matter. In my judgment, the counterclaim fails and must be dismissed.

Birkett L.J. (read by Evershed M.R.). I agree with the decision that the appeal should be dismissed, and that the cross-appeal should also be dismissed. It is a decision based upon the special and peculiar facts of the case, as they must be presumed to have been found by the county court judge. The Master of the Rolls has stated the facts of the case, the contentions of counsel, the relevant statutes, and has construed what he regards as the findings of fact by the judge, so that I may add all that I desire to say in a very much shorter form.

The questions to be decided were whether the payment of £850 was a premium within the meaning of section 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949, and section 18 of the same Act, and whether the landlord as a condition of the grant to the tenant of the underlease in question had required the payment of the £850.

The county court judge, without using precise language, seems to have decided: (*a*) The £850 was not a premium within the meaning of the Act, because it never lost its character as rent, and the standard rent was never exceeded; (*b*) the £850 was "commuted rent" to the knowledge of the plaintiff, and therefore not a premium. He made no express finding whether the landlord had made the payment of the £850 a condition of the grant, or whether the landlord had required it. When the judge says that the £850 "escapes, but only just escapes, from the "section" he must mean, I think, that the £850 had difficulty in escaping from the definition of "premium," and once he had decided that the £850 was not a premium, the plaintiff's case failed.

I think that the following three passages from the judge's judgment embody the substance of his decision: "This is rather "a border-line case. I am satisfied that the landlord here was "not endeavouring to obtain from the tenant more than the "Acts allowed, but that he was trying to obtain that amount "in rather an abnormal form. I am sure that the defendant "was alive to the advantage of collecting 14 years' rent in "advance . . . I think he had no intention of getting more "from the flat than the Rent Acts allowed him to take, but he "thought that by approaching the matter in that way I have "described he was keeping on the right side of the law. I think "he must have said something to the plaintiff about a payment "of rent in advance—indeed it may have been she who "suggested it. I doubt, however, whether with their combined "knowledge of English any elaborate discussions had taken "place, but it seems to be plain that commuted rent or rent "in advance must have been discussed before Mr. Hulkes (the "managing clerk of the solicitors acting for the plaintiff) came "on the scene."

The plaintiff was a Belgian with a very limited knowledge of English, and the defendant came from Czecho-Slovakia and, apparently, spoke English fluently, but imperfectly. How the phrase "commuted rent" originated in these circumstances is a little obscure, but there is no doubt it was in existence when Mr. Hulkes came on the scene; and the judge was naturally much impressed by this fact.

The history of the Rent Act legislation shows that one of the primary purposes was to make sure that the landlord could not wreck the whole design by obtaining in one way or another sums of money from the tenant in addition to the permitted or standard rent.

What the judge appears to have done in the present case is to have examined the wording of section 18 (2) of the Act of 1949 and then said: "This landlord has not received any fine "or other like sums or any other pecuniary consideration in "addition to rent," and therefore the contention that the £850 was a premium within the definition failed. But the judge appears to have made another finding of fact, which appears to me to make it impossible for this court to disturb his judgment, and that finding was that whether the plaintiff originated the idea of "commuted rent" or not, she certainly agreed to the sum of £850 being made part of the consideration, that sum representing a compounding of an agreed part of the total rent, which the defendant genuinely believed he was justified in taking. Some discussion took place whether or not the judge could listen to the oral evidence of the parties, but, in my opinion, he was clearly right in admitting it. He found the evidence of the plaintiff and the defendant to be unreliable, and the only witness upon whom he could place any reliance really added nothing to the solution of the real problems in the case.

What the defendant did in this case was to calculate the standard rent of the flat, divide it into two portions of £73 10s. and £190, calculate the sum of £73 10s. paid in advance for 14 years, allow a discount, because the sum is being paid at once instead of being spread over the years, and thus arrive at the sum of £850 in respect of that portion of the rent. The remaining portion of the rent, £190, was to be paid as periodic rent in the ordinary way. The county court judge said that this method was abnormal but quite legal, inasmuch as the defendant had never received or attempted to receive more than the standard rent to which he was entitled.

It is not necessary for the decision of this appeal to decide whether the judge was right in saying that, in the circumstances of this case, the £850 was not a premium within the definition section. The matter was concluded for him, when he found that the defendant would not get more than the standard rent. He never considered whether the lump sum, made up in the way I have indicated, could yet be a "premium" despite the fact that the total amount to be received would not have exceeded the standard rent legally permissible.

On the facts in the present case, the defendant would have received in the first year of the tenancy the sum of £263 10s., whereas in fact he received £1,040, some of which in the ordinary way would not have been payable for many years. Most important questions at once arise. Was this "commuted rent" in the circumstances of this case still to be regarded as rent within the meaning of section 18 (2) of the Act of 1949, or had it changed its character? Was it not to be regarded as a sum, calculated, no doubt, on what the standard rent might have been, but, nevertheless, no longer rent in the meaning given to it in the definition? If, for example, the judge found that the defendant required the payment of this sum of £850, calculated in the way it was as "commuted rent," as a condition of the grant of the tenancy to the plaintiff, would it not be regarded as a premium within the meaning of section 18 (2) of the Act of 1949, and recoverable under section 2 (5)?

It is not necessary for the decision in the present appeal that an answer should be made to these questions, for the second point in the appeal seems to me to be conclusive on the judge's finding. The prohibition laid upon the landlord is that he shall not require the payment of a premium as a condition of the grant, and, if he does so, the tenant under subsection (5) can recover any sum so paid as a premium, because it could not lawfully be required. In the three passages from the judge's judgment which I cited in an earlier part of this judgment it is plain that the defendant "was alive to the advantages of "collecting 14 years' rent in advance," and "must have said "something to the defendant about a payment of rent in "advance," yet the whole effect of the judge's judgment is to make it plain that, in his opinion, the £850 was never "required" by the defendant as a condition of the grant of the tenancy of the flat, but, on the contrary, the initiative may well have come from the plaintiff and the agreement was in accordance with her wishes.

The plaintiff's case before the county court judge was that the £850 was demanded by the defendant as "key money" as a condition of the grant of the tenancy, but the judge rejected this evidence entirely, and, after listening to the oral evidence and considering the underlease and the correspondence, he came to the conclusion that the plaintiff's case failed. I would decide this appeal on the ground that it was not shown that the defendant required the payment of a premium as a condition of the grant of the tenancy of the flat. With regard to the counterclaim, I agree with what the Master of the Rolls has said and have nothing to add.

Romer L.J. The consideration expressed in the lease of November 4, 1952, from the defendant to the plaintiff was twofold and consisted first of "the sum of £850 paid by the tenant "to the landlord on or before the execution" of the lease, and, secondly, "of the rent and covenants by the tenant" thereafter reserved and contained. The main issue on the appeal is whether the sum of £850 is recoverable by the tenant by virtue of section 2 (5) of the Landlord and Tenant (Rent Control) Act, 1949, notwithstanding that it formed an important part of the consideration for the term of years which was granted to her, and which she is still enjoying.

As a preliminary to this question the point arises whether the plaintiff's claim to recover this sum as being an illegal premium falls to be determined solely according to the terms of the lease, or whether extrinsic evidence as to the intention of the parties is also admissible. The county court judge admitted oral and other evidence of intention, and in my opinion he was plainly right in doing so. As he pointed out, the plaintiff is in substance charging the defendant with committing a criminal offence, and the defendant is, in my judgment, clearly entitled to prove that the agreement between himself and the plaintiff was innocent, and to show what the mutual intention of the parties really was. If this were not so, a mere copying error of a clerk in a document might result in a quite unwarranted finding of criminal intent on the part of the persons who had executed it—for example, the mistaken substitution of £250 for £150 in an agreement for purchase of some article of which the maximum controlled price is the latter figure. Moreover, the extrinsic evidence is not sought to be introduced in the present case with a view to contradicting anything that is expressed in the lease, but in order to show what was the true nature of the £850, which, it is to be observed, is nowhere described in the lease as a "premium."

The evidence, accordingly, may properly be considered, but, inasmuch as the judge found himself able to place but little reliance upon what the plaintiff or the defendant or the defendant's wife told him when they were in the witness-box, their testimony (which was the principal evidence upon the main issue) does not advance the matter very far. The judge obviously rejected the plaintiff's evidence that the defendant demanded "key-money," for that, if true, would have been the end of the case. But he finds, I think, that the defendant throughout thought that he was entitled to receive commuted rent, and that that description of the £850 was used both by the defendant and by the plaintiff at the interview which Mr. Hulkes, the plaintiff's legal adviser, attended on October 18 or 20, 1952. Further, the £850 was also referred to as "commuted rent" in Mr. Hulkes's letter to the defendant's solicitors on October 20, 1952, and was similarly described in the solicitors' reply of the 29th. Mr. Boggis's evidence, which the judge accepted, does not appear to me to be in any way conclusive as to the nature of the payment which the plaintiff agreed to make; it does little more than elucidate the way in which it was eventually quantified.

I accordingly conclude that (whatever the phrase may mean) the sum in question was regarded by both parties to the lease as being "commuted rent," and it was, indeed, on that very basis that the calculations which were envisaged by clause 2 (15) of the lease were to be made in the event of the plaintiff surrendering the premises.

There was considerable discussion before us as to whether, on this basis, the £850 ought properly to be regarded as a "premium" for the purposes of section 2 of the Act of 1949. There can, I think, be little doubt but that a payment, which is made on the grant of a lease and which represents a discounted payment of rent in advance, would in most cases fall within the judicial explanations which are to be found in the reports of what constitutes a "premium." (See, for example, *per* Warrington L.J. in *King* v. *Earl Cadogan*.[12]) Mr. Ahern, however, on behalf of the defendant submitted that in section 2 of the Act the word "premium" is used in a special sense, namely, in contradistinction to rent, and, therefore, that, so long as a landlord of rent-controlled premises receives no more in all than the standard rent, a pre-payment of part of that rent does not constitute a "premium"; for the payment is referable, and referable only, to a part of the standard rent. On the other hand, said Mr. Ahern, if and to the extent that the landlord receives a payment, which is in excess of the total standard rent of his premises calculated over the period of any lease which he grants, that excess is not rent or in any way referable to rent and is accordingly an illegal premium and recoverable by the tenant.

It may be that in certain circumstances and to a limited extent the demand of some pre-payment of rent as a condition of granting a lease may be lawfully made by a landlord; but, as the point does not, in my view, arise in the present case for decision, I would prefer to express no concluded opinion upon it. If, however, this appeal depended upon the alleged right of the defendant to demand £850 "commuted rent" as a condition of granting the plaintiff a 14-year lease in 1952, I should have felt the greatest difficulty in deciding in his favour —and apart altogether from the fact that the lease contained no provision for the return of any part of this sum to the plaintiff in the event of the lease being determined by the defendant at the end of the seventh year under clause 4 (3). If the defendant could lawfully have demanded this payment, then I can see no logical reason why a landlord should not require payment of substantially the whole of the standard rent in advance as a condition of granting a lease for 14 years, or 21 years, or any other term of years. In my judgment, such a payment would be clearly within the scope and object of section 2, and none the less because, if it were added to the rent reserved by the lease eo nomine and spread over the demised term, it would not exceed the aggregate standard rent for the period. It seems to me that, although the primary object of section 2 was to prevent landlords from circumventing the disadvantages of the standard rent by demanding a premium in addition to it, a subsidiary object, and one within the language of the section, was to prevent the exaction of payments of a capital nature from tenants who would, in many cases, be unable to raise them.

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[12] [1915] 3 K.B. 485, 492.

As I have indicated, however, the question of what does and what does not constitute an illegal premium does not, in my opinion, fall for decision on the present appeal. The reason for this is that the plaintiff failed to prove, in my judgment, an essential ingredient of her claim under section 2 (5) of the Act, namely, that the defendant required payment of the £850 as a condition of granting the lease. That she had to establish this is apparent, I think, from the language of the subsection which, so far as material, is in the following terms: "Where under an "agreement made after March 25, 1949, any premium has been "paid which, or the whole of which, could not lawfully be "required under the foregoing provisions of this section . . . the "amount of the premium, or so much thereof as could not law-"fully be required or have been required, as the case may be, "shall be recoverable by the person by whom it was paid." In order to determine the effect of this subsection, it is necessary to ascertain what premiums cannot lawfully be required under the earlier provisions of the section; for it is only those premiums that can be recovered under subsection (5). The prohibited premiums are (so far as lessors, as distinct from assignors, are concerned) those which a landlord requires, in addition to the payment of rent, as a condition of the grant, renewal or continuance of a tenancy of a dwelling-house, being a tenancy to which the principal Acts apply, such that when the dwelling-house is let under the tenancy it is a dwelling-house to which the principal Acts apply. It is an essential feature of these unlawful premiums that their payment has been "required as a "condition of the grant, etc.," and it follows that premiums, which do not possess this characteristic, are not within the section. Further, the onus is on the tenant, in my opinion, to prove that a premium does possess that offending characteristic before he can recover it. Did the plaintiff establish this by her evidence in the present case? She sought to do so by saying, in effect, that the defendant demanded the £850 as key money for the grant of the lease, and, if the judge had accepted her evidence, the sum would have plainly qualified for repayment on the ground that its payment had been "required." The defendant, on the other hand, said that, so far from requiring it, the plaintiff herself had suggested an initial payment in order to obtain a lower rent, and, if this were true, then, clearly, the payment did not possess the prohibited feature of having been required by the landlord. But the judge did not accept the plaintiff's evidence, nor do I think that he accepted the defendant's evidence. He did accept Mr. Boggis's evidence, but this gentleman had no testimony to offer upon this particular point. There was no other evidence upon it, and, therefore, in my opinion, the plaintiff failed to discharge the onus which lay upon her of proving that the £850 came within the prohibited category of premiums.

A breach of section 2 (1) of the Act is an offence and can be visited with penal consequences. It follows from this, in my judgment, that the court should not attribute to it a scope beyond which its language reasonably requires. The subsection does not say (as it presumably would have said if such had been the intention of Parliament) that "a person shall not receive the payment of any premium in addition to the rent." Had it been expressed in those terms, then a premium would be illegal, even if the intending tenant himself desired to pay one in consideration of obtaining a rent lower than the standard rent—as, indeed, the defendant said that the plaintiff desired in the present case. The subsection is not, however, so expressed, and, in my judgment, a landlord does not infringe its provisions or lay himself open to penalties by receiving a premium which has not been required by him as a condition of granting (or renewing or continuing, as the case may be) a tenancy; but subject, of course

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(as was pointed out by Somervell L.J. in his judgment in *O'Connor* v. *Hume* [13]), to the transaction not being a "sham." The question in any given case of whether the landlord so required a premium which he had received would be one of fact for the trial judge to determine on the evidence which was adduced before him. The onus would be on the tenant, however, to establish that the subsection had been infringed, and the judge did not find that the plaintiff had discharged this burden in the present case. I am, therefore, of opinion that her action was rightly dismissed, and for the above reasons and those stated by my brethren I agree that this appeal must fail. I agree, further, that the cross-appeal for rectification should also be dismissed.

Appeal dismissed; cross-appeal dismissed.

Solicitors: *Cohen & Cohen; J. Rothwell Dyson & Co.; Pengelly & Co.*

B. A. B.

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[13] [1954] 1 W.L.R. 824.

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Evershed M.R., Jenkins and Romer L.JJ.

EVANS *v.* JONES.

Agriculture—Agricultural holding—Repairs—Compensation—Landlord's claim for dilapidations—Liability of tenant to leave "in good "tenantable repair, order and condition"—Meaning—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *ss.* 6, 57, 58*—Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations,* 1948 (*S.I.* 1948, *No.* 184), *Sch., Part II, paras.* 5, 9, 10.

On the determination of an oral tenancy of an agricultural holding the landlord claimed under section 57 of the Agricultural Holdings Act, 1948, compensation for dilapidations, including claims in respect of the tenant's failure to maintain the fertility of certain fields and to keep specified hedges and ditches in repair:—

Held, (1) that if the landlord made good his specific allegations that the tenant had failed to fulfil his responsibilities to farm certain fields according to good husbandry, for example, by not properly feeding or fertilizing pastures, he was entitled under section 57 by way of compensation to the cost of bringing those fields back into a proper state of health.

(2) That the phrase in paragraph 5 of the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations,

1948, which imposed on a tenant the obligation "to keep and leave "clean and in good tenantable repair, order and condition," took effect according to its terms and was not restricted to an obligation to leave the items enumerated as clean and in as good repair as they happened to be at the beginning of the tenancy; but, in determining whether the obligation had been complied with in respect of any particular item, regard should be had to its age, character and condition at the beginning of the tenancy, and the length of the tenancy.

APPEAL from a decision of Judge Trevor Morgan Q.C. given in the Lampeter County Court.

By an oral tenancy the landlord, John Thomas Evans, let Mock Farm, Ffostrasol, in the parish of Llandyssul, Cardigan, with some 145 acres on a yearly tenancy beginning on September 29, 1949, at the yearly rent of £80. The tenant determined the tenancy on September 29, 1953, by notice to quit, and claimed against the landlord certain payments for tenant right (as to which no question arose on the appeal). The landlord claimed against the tenant in respect of dilapidations, his claim being made under section 57 of the Agricultural Holdings Act, 1948,[1] on the ground that the tenant had not farmed according to the rules of good husbandry. The landlord alleged failure on the tenant's part to fulfil the liabilities imposed on a tenant by the Agriculture (Maintenance, Repair and Insurance of Fixed

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[1] Agricultural Holdings Act, 1948, s. 57: "(1) The landlord of an agri- "cultural holding shall be entitled to "recover from a tenant of the holding, "on the tenant's quitting the holding "on the termination of the tenancy, "compensation in respect of the "dilapidation or deterioration of, or "damage to, any part of the holding "or anything in or on the holding "caused by non-fulfilment by the "tenant of his responsibilities to farm "in accordance with the rules of good "husbandry.

"(2) The amount of the compen- "sation payable under the foregoing "subsection shall be the cost, as at "the date of the tenant's quitting the "holding, of making good the dilapi- "dation, deterioration or damage."

S. 58: "Where, on the quitting "of an agricultural holding by the "tenant thereof on the termination of "the tenancy, the landlord shows that "the value of the holding generally "has been reduced, whether by reason "of any such dilapidation, deteriora- "tion or damage as is mentioned in "subsection (1) of the last foregoing "section or otherwise by non-fulfil- "ment by the tenant of his responsi- "bilities to farm in accordance with "the rules of good husbandry, the "landlord shall be entitled to recover "from the tenant compensation there- "for, in so far as the landlord is not "compensated therefor under subsec- "tion (1) of that section . . . of an "amount equal to the decrease attri- "butable thereto in the value of the "holding as a holding . . .

"Provided that compensation shall "not be recoverable under this section "unless the landlord has, not later "than one month before the termina- "tion of the tenancy, given notice in "writing to the tenant of his intention "to claim compensation thereunder."

Equipment) Regulations, 1948[2] (hereinafter called Statutory Instrument 184). The landlord did not claim under section 58 of the Act. The landlord claimed under 25 heads, which included claims in respect of alleged failure to manure specified fields, to maintain and repair specified hedges, fences and ditches. The total claim exceeded £800.

The claims of the landlord and tenant were referred to an arbitrator pursuant to the provisions of the Agricultural Holdings Act, 1948. The arbitrator stated a special case asking (inter alia):—

(1) Was the obligation laid on the tenant by Statutory Instrument 184 to repair, and not to put in repair?

(3) Was the claim for dilapidations maintainable in law?

(4) Were certain specified claims (being claims based on alleged failure to maintain the fertility of certain fields and to maintain them in a good state of cultivation and to cut and lay certain boundary hedges and fences) claims for deterioration under section 58 of the Act and accordingly not maintainable in the arbitration?

The county court judge held that the obligation laid on the tenant by Statutory Instrument 184 was to repair, and not to put in repair, and that there was no liability on the tenant to put the farm into better condition as to hedges, fences or ditches than when he took it; and, further, that the claim for dilapidations was maintainable at law under section 57.

The landlord appealed and the tenant cross-appealed.

J. T. Plume for the landlord. The question on the appeal is as to the extent of the landlord's claim in respect of dilapidations having regard to the provisions of the Agricultural Holdings Act, 1948, and of the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948. The first question is as to the extent of the tenant's liability under paragraph 5 of

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[2] Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948 (S.I. 1948, No. 184), Sch., Part II, "*Rights and* "*liabilities of the tenant*: Except in "so far as such liabilities fall to be "undertaken by the landlord under "Part I hereof:

"5. To repair and to keep and leave "clean and in good tenantable repair, "order and condition, the farmhouse, "cottages and farm buildings, together "with all fixtures and fittings, drains, ". . . fences, live and dead hedges, "gates, field walls, posts, stiles . . . "in and upon the holding, or which "during the tenancy may be erected "or provided thereon . . .

"6. To replace or repair and, upon "replacement or repair, adequately to "paint, gas-tar or creosote, as may be "proper, all items of fixed equipment, "and to do any work, where such "replacement, repair or work is rendered necessary by the wilful act "or negligence of the tenant or any "members of his household or his "employees."

Schedule II to the Statutory Instrument 184, which imposes on a tenant an obligation "To repair and to keep and leave clean "and in good tenantable repair." On its true construction that means that the tenant must put in repair such parts of the farmhouse and of the walls, fences, ditches and other items enumerated in paragraph 5 as were not in repair at the commencement of the tenancy. The wording of this regulation is clear, and words should not be read into it restricting it to maintaining the farm and its equipment in the state of repair in which it was when the tenancy began: *Proudfoot* v. *Hart.*[3] Secondly, having regard to the wording of section 57 (2) of the Act, the basis on which compensation should be assessed is the cost of making good the dilapidations. The judge was wrong in holding that the arbitrator should base the damages on the diminution of the value of the reversion. Thirdly, this claim in respect of the failure to maintain hedges, ditches and fences is rightly brought under section 57 of the Act, and so also is the claim for compensation in respect of the failure to maintain the fertility of certain fields. The tenant has failed to fulfil his "responsibilities to farm in accordance with the rules of good "husbandry." "Responsibilities" covers all the tenant's obligations, except any imposed by the landlord which are not in accordance with good husbandry. The landlord can claim under section 57. As he did not serve notice in accordance with the proviso to section 58, he cannot claim under that section. The remedy given by section 58 is in addition to that given by section 57. It meets the case where there has been a deterioration in the value of the holding which is not covered by the compensation received under section 57.

M. A. L. Cripps for the tenant. The judge was right in limiting the obligation imposed by paragraph 5 of the regulations to repairing and not extending it to putting the demised premises into repair. The obligation imposed with regard to hedges, ditches and fences is to maintain them in the condition in which they were in at the beginning of the tenancy. The language of paragraph 5 must be contrasted with that of paragraph 6, which expressly imposes an obligation to "replace" the items there enumerated. Paragraph 5 imposes no obligation, for example, to put up a gate where there was none at the beginning of the tenancy. The obligation is merely to maintain the farm in that state of repair in which it was in at the beginning of the tenancy.

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[3] (1890) 25 Q.B.D. 42; 6 T.L.R. 305.

A large number of the items in respect of which the landlord claims compensation do not fall within section 57 at all. He should have claimed under section 58, on the ground that the value of the holding had been reduced. Section 58 deals with general deterioration of the holding, which is what is alleged here, as opposed to less serious and specific breaches of the rules of good husbandry for which compensation should be claimed under section 57. The allegations that the fertility of specific fields has not been maintained is not a ground for claim under section 57; it is a matter falling within section 58.

J. T. Plume in reply. Section 58 of the Act affords to landlords an additional remedy where compensation payable under section 57 is not enough. A tenant may reduce the value of an agricultural holding in such a way that specific claims cannot be made under section 57 which would cover the whole loss. The items for which the landlord claims here all fall within section 57.

EVERSHED M.R. This appeal raises certain questions which, on examination, resolve themselves into two (one upon the appeal and one upon the cross-appeal), both of which are under the Agricultural Holdings Act, 1948. [His Lordship stated the facts and continued:] The questions with which we are concerned arose upon a special case stated by the arbitrator to the county court, and the appeal is from the judge's answers to those questions.

The questions were these: (1) Is the obligation laid on the tenant by Statutory Instrument 1948, No. 184, to repair, and not to put into repair? (3) Is the claim for dilapidations—that is, the landlord's claim—maintainable in law? (4) Are the claims numbered (and then there are some 10 or so numbers) claims for deterioration under section 58 of the said Act and accordingly not maintainable in this arbitration? I think that the third and fourth questions are really part of the same problem and can be treated as a single point, being the matter raised on the cross-appeal. As may be discerned from the form of the last question, the claim by the landlord was not under section 58 of the Act, but exclusively under section 57. [His Lordship read section 57 (1) and (2) and continued:] Subsection (3) of that section provides an alternative right in the landlord to claim compensation for breach of obligations in the tenancy, but that subsection only applies in cases of a written contract of tenancy, which was not this case.

The question at one time was raised whether the cost of doing the necessary work was the proper basis of compensation.

assuming that the claims under section 57 were made good; but it was admitted by Mr. Cripps (and, if I may say so, it is quite clear, in view of the terms of section 57 (2)) that the cost is the proper basis of compensation in so far, of course, as the claims are found to be established under section 57. But the question on the cross-appeal, and raised by the third and fourth of the arbitrator's questions, is whether certain of the claims made by the landlord are properly made at all under section 57 and should not have been made under section 58. I will consider that matter first, although it is only on the cross-appeal.

Section 58, so far as is relevant, provides: "Where, on the "quitting of an agricultural holding by the tenant thereof on the "termination of the tenancy, the landlord shows that the value "of the holding generally has been reduced, whether by reason of "any such dilapidation, deterioration or damage as is mentioned "in subsection (1) of the last foregoing section"—that is, of course, section 57—"or otherwise by non-fulfilment by the tenant "of his responsibilities to farm in accordance with the rules of "good husbandry, the landlord shall be entitled to recover from "the tenant compensation therefor, in so far as the landlord is "not compensated therefor under subsection (1) of that section "or in accordance with subsection (3) thereof, of an amount equal "to the decrease attributable thereto in the value of the holding "as a holding, having regard to the character and situation of "the holding and the average requirements of tenants reasonably "skilled in husbandry." There follows a proviso that compensation cannot be recovered under section 58, unless a notice has been given in writing before the termination of the tenancy. As no such notice was given in this case by the landlord, no claim can now be preferred by the landlord under section 58, and no claim in fact has been made by him.

In order to illustrate the point which is submitted by the cross-appeal, it will be convenient to take two of the instances mentioned by the arbitrator, items 8 and 9. No. 8, so far as it is relevant, refers to a certain field of 5.923 acres, and says of it: "Many consecutive hay crops have been taken from this field "without applying fertilisers. Cost of fertiliser, three tons of "basic slag, £13; 10 cwt. compound fertiliser with potash, £10; "12 tons of lime, £18," a total of £41. The next item, No. 9, relates to another field of rather larger dimensions: "This pasture "field contains rough herbage with weeds and moss in abundance. "It is in a bad state of fertility. Cost of reclaiming same at £10 "per acre, £108." Though it is perhaps anticipating what I shall later say, it will be observed that those allegations are allegations not of breaches of anything in the Statutory Instrument, but constitute alleged non-fulfilment by the tenant of his responsibilities to farm in accordance with the rules of good husbandry.

It is said, however, by Mr. Cripps that those claims were of a nature only capable of being put forward under section 58. I am quite unable to agree with that contention. Whether the claims, and in particular the two examples Nos. 8 and 9, are in fact well founded or not will depend upon the conclusions of the arbitrator; but the allegation is, right or wrong, that as respects those two fields, the tenant has failed to fulfil his responsibilities to farm them according to the rules of good husbandry, for example, by not properly feeding or fertilizing the pastures. If that claim is made good, then according to section 57 the landlord is entitled by way of compensation to the cost of bringing those fields back into a proper state of health.

As I understand it, section 58 covers, among others, the case where, as a result of the specific failures by the tenant (which failures are the subject of claims made under section 57) the landlord can also prove a general depreciation of his farm as a whole; that claim being, however, subject to the limitation that he must always, in the kind of case where there is also a claim under section 57, bring into account anything he recovers under section 57, so that he does not in any case recover twice over.

I think, therefore, that the cross-appeal fails, and that the judge rightly answered the two questions 3 and 4 submitted to him by the arbitrator. I emphasize that I do not say, and quite clearly the judge did not say, that the claims, of which I have read two examples, are necessarily good claims. That is a matter of fact for the arbitrator.

I now return to the other question raised on the appeal, which is not, perhaps, so easy. The first question submitted by the arbitrator is general in terms, but, as I have understood the case, it is found in fact to relate to certain specific matters, namely, fences, hedges and ditches, and it refers to the application and effect of what has been called Statutory Instrument 184. In order to introduce that instrument, I must first refer to section 6 (1) of the Agricultural Holdings Act, 1948, which provides: "The "Minister may . . . make regulations prescribing terms as "to the maintenance, repair and insurance of fixed equipment "which shall be deemed to be incorporated in every contract of "tenancy of an agricultural holding, whether made before or "after the commencement of this Act." At first sight, the reference to "fixed equipment" does not sound readily applicable to hedges, fences and ditches, but there seems little doubt that it is in fact so applicable. In pursuance of that power, the Minister in due course made the Statutory Instrument 184, the full title of which is the Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations, 1948. It should be said of those regulations that that instrument was first made in pursuance of powers under the Agriculture Act, 1947, but it is now beyond question applicable to the Act of 1948 and must be treated as made in pursuance of the powers under the section which I have read.

The form of this intrument is, first of all, three operative paragraphs, the effect of which, so far as relevant, is that the provisions of the schedule are to constitute the regulations to which section 6 looked forward. The first part of the schedule is headed "Rights and liabilities of the landlord," and the second part "Rights and liabilities of the tenant." The second part begins: "Except in so far as such liabilities fall to be undertaken "by the landlord under Part I hereof:" the liability of the tenant (paragraph 5) is "To repair and to keep and leave clean and in "good tenantable repair, order and condition, the farmhouse . . . "together with all fixtures and fittings, drains, sewers, water "supplies, pumps, fences, live and dead hedges, gates, field "walls, posts, stiles, bridges, culverts, ponds, watercourses, "ditches, roads and yards in and upon the holding, or which "during the tenancy may be erected or provided thereon."

Paragraph 9 is a specific obligation "to cut and lay a proper "proportion of the hedges in each year of the tenancy so as to "maintain them in good and sound condition." Paragraph 10 is "to dig out, scour and cleanse all . . . ditches . . . as may be "necessary to maintain them at sufficient width and depth."

It seemed to us, when Mr. Plume started his argument for the landlord, that there might be a question whether the formula "responsibilities to farm in accordance with the rules of good "husbandry," which is the test, so to speak, of liability under section 57 (1), comprehended a failure on the tenant's part in the performance of the obligations imposed on him by Part II of the regulations now under consideration. We were, however, relieved from expressing any view on that matter, because Mr. Cripps conceded, for the purposes of this appeal, that the tenant was liable under section 57, if it was shown in fact that he had failed to perform, inter alia, upon their proper construction, the obligations imposed by Part II, paragraphs 5, 9 and 10, of Statutory Instrument 184.

The answer of the judge to the question posed was that the obligation imposed by Statutory Instrument 184 was to repair, but not to put into repair. The judge went on: "There is no "liability on the tenant to put the farm in a better condition as "to hedges, fences and ditches than it was when he first took "over."

The actual matters of fact involved under this question are not, apparently, of great magnitude; but the question is not, as I think, whether "repair" involves putting into repair (though I should have thought, prima facie, that the two things were the same), but of the meaning of the later words in the regulations, "to keep and leave clean and in good tenantable repair, order "and condition." I myself see no reason why those words should not mean what they say. I do not think, for my part, that the matter is advanced by substituting, if it were permissible so to do, some other words for those in the regulation itself. In my judgment, the tenant's obligation under paragraph 5 is to repair and keep and leave clean and in good tenantable repair, order and condition the various things which are there enumerated, and is not merely to keep and leave those things as clean and in as good repair as they happened to be at the beginning of the tenancy; but, in determining whether the obligation has been complied with as regards any particular item, regard should, I think, undoubtedly be had to its age and character and its condition at the commencement of the tenancy; in other words, I think that the arbitrator will judge the facts as they are presented to him in the light of all the circumstances, including the condition of the items, their age, and so on, at the time that the tenant took over, and I think also that he will take into account, as Mr. Plume conceded, the length of the tenancy and the time, therefore, the tenant had to do that which he was called upon to do. The question is in every case whether, as a matter of good husbandry and common sense, and having regard to all these matters, the tenant in fact did perform the obligations stated in the Statutory Instrument as an agricultural tenant, to keep and leave the fences, hedges and ditches in good tenantable repair, order and condition. As I have said, I would myself put no gloss on the words used in the regulation; but, having expressed my view upon the plain meaning of the terms, I would leave it to the arbitrator to form his opinion upon all the separate matters in the light of all the relevant circumstances.

The notice of appeal asks that the obligations of the tenant under the Statutory Instrument were to put and keep in repair, and to leave in clean and good tenantable repair, order and condition the fences, hedges and ditches, and so on. As I have already said, I think that to put in the words "to put and" is not only unnecessary but also futile, and, I think, rather obscures the real issue. In saying that, I am not blaming Mr. Plume or the judge, because that was the form in which the question was submitted by the arbitrator; but, the question having been so submitted, I find myself unable to agree with the comment upon it, which was made by the judge; in other words, I agree with Mr. Plume that the judge sought to put an unjustified limitation upon the meaning of the words used in the regulation. My conclusion is that the court should not answer, as a matter of general and academic principle, questions raised such as this by adding words to the terms of the regulation; but, having stated that the regulation ought, in my judgment, to take effect according to its terms and that its application is not, upon the face of it, limited by reference to the condition of the premises when the tenant went in, I would leave it to the arbitrator to determine, in the light of all the relevant circumstances and facts, whether the tenant in fact performed his obligations.

I think, therefore, that the appeal ought to be allowed, but that the cross-appeal must be dismissed.

JENKINS L.J. I agree.

ROMER L.J. I also agree.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Ellis & Fairbairn for James Jones, Son & Francis, Llandyssul; Amphlett & Co., for Amphlett Lewis & Evans, Llandyssul.*

B. A. B.

1954
July 19, 20,
21, 22, 23;
Oct. 4, 5,
6, 7, 8, 11;
Nov. 8.

Devlin J.

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1955
Feb. 21, 22,
23, 24, 25;
Mar. 21, 22;
Apr. 5.

Singleton, Hodson and Morris L.JJ.

COMPANIA NAVIERA MAROPAN S/A *v.* BOWATERS LLOYD PULP AND PAPER MILLS LD.

[1952 C. No. 3563.]

Shipping—Charterparty—Safe port—Ship to "proceed to not more "than two approved loading places as ordered . . . ship to load "at two safe berths or loading places"—Whether charterers under obligation to nominate safe loading place—"Approved"—Unsafe place—Damage to ship—Master not negligent—Charterers' liability.

Damages—Remoteness of damage—Contract—Novus actus interveniens —Volenti non fit injuria.

By a charterparty dated October 17, 1951, the steamship *Stork* was chartered to load a cargo of logs for carriage from Newfoundland to England. By clause 1 of the charterparty it was agreed that the vessel should proceed to not more than two "approved "loading places as ordered . . . or so near thereunto as she may "safely get . . . Charterers have the right to order the ship to "load at two safe berths or loading places . . ."

The charterers directed the ship to load at a place on the east coast of Newfoundland and she arrived there on October 25, 1951. She was unable to moor on that day because an easterly wind was blowing. On the following day she was successfully moored and loading was commenced, but three days later, during a heavy gale in the night, she dragged her anchors, ran aground, and was severely damaged. The master had had fears as to the safety of the place, but he had been reassured by an experienced pilot sent to meet him by the charterers.

On a claim by the shipowners against the charterers for damages on the ground that the charterers had ordered the vessel to load at an unsafe place Devlin J. found that the loading place was unsafe, that the master had not been guilty of any negligence or imprudence, and that the shipowners were entitled to damages. On appeal by the charterers:—

Held, (1) that under the contract the charterers were under an obligation to nominate at least one loading place which was safe for the particular ship chartered, at or about the time when she was to use it, and "approved" in the sense of being a loading place generally acceptable in the trade or business, and therefore impliedly safe.

(2) That on the facts the nominated loading place was unsafe, and the charterers being in breach of their duty under the charter were liable for the damage to the ship which was the natural and probable consequence of that breach.

(3) That the master of the ship, having been placed on the horns of a dilemma, had acted reasonably in obeying the order of the charterers and in placing reliance on the assurance given to him, and the doctrine of volenti non fit injuria was not applicable.

G. W. Grace & Co. Ld. v. *General Steam Navigation Co. Ld.* [1950] 2 K.B. 383; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201 and dissenting judgment of Dixon C.J. in *Reardon Smith Line Ld.* v. *Australian Wheat Board* [1954] 2 Lloyd's Rep. 148 approved.

Majority decision in *Reardon Smith Line* v. *Australian Wheat Board* not followed.

Decision of Devlin J. affirmed.

Action.

The plaintiffs were the owners of the steamship *Stork*, a vessel with a gross tonnage of 7,111, a length of 441 feet and a beam of 57 feet. The defendants were paper manufacturers, part of their business being to export logs from Newfoundland to England to make wood pulp for paper at their factory in this country. By a charterparty dated October 17, 1951, and made in London between Goulandris Brothers Ld., as agents for the owners, and the charterers it was agreed by clause 1 that the *Stork* should "proceed to not more than two approved loading "places as ordered in Newfoundland on the east coast, or so "near thereunto as she may safely get, and there load, always "afloat, or safe aground where customary for vessels of similar "size and draft, from the agents of the said charterers, not "exceeding what she can reasonably stow and carry over and "above her tackle, apparel, provisions, and furniture, a full and "complete cargo of pulpwood . . . Charterers have the right to "order the ship to load at two safe berths or loading places or "one safe berth or loading place combined with one safe "anchorage in the same loading place without extra freight." The place at which the vessel was directed to load was an arm of the sea called Tommy's Arm. This was one of several places on the east coast of Newfoundland from which the defendants exported wood. The season for export began at the end of May and went on until November, and the place to which a vessel was directed varied according to the season of the year and the weather conditions to be expected there. Tommy's Arm was the place which was considered suitable for the end of the season. It was an inlet about a mile in length surrounded by high hills. The arm ran east and west and was entered from the east. At the far end or in the north-east corner there was a cove called Lewis Cove, where logs were held in the water behind a boom. In the centre of the arm there was an island called Central Island. There were three berths or loading places in the arm where a vessel could be moored, including one called berth C. In that berth the vessel's head was held by her anchors and her stern was held by being moored to ring bolts on the western end of Central Island. In that position she had not, for a large vessel, a great deal of water on either side of her. On her port side she had some rocks called the Five Foot Rocks, and on her starboard quarter the Seal Rocks. The distance between those two rocks when awash at low water was 1,040 feet.

The *Stork* was an exceptionally large ship to be directed to load at Tommy's Arm, the usual length being about 300 feet. Captain Miller, who held the position of wood shipping superintendent in the defendant company, was in charge of shipping operations in Newfoundland on their behalf and was at the material times at Tommy's Arm.

On October 25 the *Stork* arrived about 10 miles east of Tommy's Arm, where she was met by a motor-boat with one Watkins, a fisherman who had lived on that part of the coast for 60 years, in it. He, although there was no compulsory pilotage, was one of those who usually acted as a pilot. He received payment from the defendants, but they charged the ship with it as one of the items in their disbursements account. He brought the *Stork* in about noon and was told to moor her at berth C. The vessel dropped her anchors in the places which the pilot indicated and then moved astern to her loading position so that she could be secured by stern lines to the Central Island, but she was taken by an easterly wind and swung across towards the Lewis Cove boom. It was thought to be imprudent to try to moor the ship again that day in an easterly wind and, accordingly, she was taken out of Tommy's Arm and thus lost about a day of her laydays.

On October 26 she was successfully moored, being secured to the Central Island by four stern lines. Loading began and continued until about noon on October 29, when it was stopped because of bad weather. That evening the weather deteriorated into a severe gale from the west or south-west.

The gale continued throughout the night and Capt. Miller remained on board till dawn. By then the ship's position had altered so that she had moved considerably to starboard in the direction of the Seal Rocks. One of her stern lines had parted during the night. The master said that she was dragging her anchors and thus was carried by the wind near the Seal Rocks so that she was in danger of going aground and damaging her rudder and propeller.

At dawn Capt. Miller left the vessel, believing her to be quite safe. At the same time, at the request of the master, he sent for the pilot. But, before the pilot had arrived, at 9.0 a.m. the master decided to move. He thought that the position had got worse and that he was in great danger of striking the Seal Rocks. He cut his remaining stern lines and steamed ahead and picked up his anchors. His idea was to get the vessel to an anchorage at the western end of the arm where he thought that she would be safer. But as he proceeded down she was taken by a gust of wind and grounded on the Five Foot Rocks. She was refloated the following day.

The owners claimed against the charterers for the damage done to the ship, on the ground that Tommy's Arm was unsafe for a vessel of that size at that time of the year, and that the charterers, by ordering her to load there, were responsible for the consequences. The charterers denied that Tommy's Arm was unsafe, and they contended also that they were not, in any event, responsible in law. They further denied that the vessel dragged her anchors, but they contended, in the alternative, that if she did it was due to her not having enough anchor chain out, and that in that event the master was negligent in not letting out more chain. The owners replied that there was no room to pay out more chain, and that in any event the master was right in allowing himself to be guided by the pilot, who advised 360 feet.

K. S. Carpmael Q.C. and *T. G. Roche* for the charterers
E. W. Roskill Q.C. and *H. V. Brandon* for the shipowners.

Cur. adv. vult.

1954. Nov. 8. DEVLIN J. read the following judgment, in which, having stated the facts, he found that the master was not negligent in not insisting on more chain being paid out; that he was not imprudent in deciding to moor the ship when he did; that the ship dragged her anchors, and that the loading place was unsafe, and continued: This leaves the question of law to be determined. The defendants contend that the charterparty contains no warranty of safety, express or implied; that if Tommy's Arm was unsafe the master ought to have known, and in fact did know, that it was unsafe and went there of his own choice. Therefore, it is submitted, the plaintiffs cannot recover for damage to the ship.

It is first necessary to see what the charterparty says about safety. It is usual for this type of charterparty to make provision in one place for the nomination of a safe port and in another place for the nomination of a safe berth within the port. As none of the loading places used by Bowaters on the east coast of Newfoundland can really be described as ports and only by courtesy as berths, this charterparty uses in both places the term "loading place." In what I may call the "port place" it provides that the ship shall "proceed to not more than two "approved loading places as ordered in Newfoundland on the "east coast . . . or so near thereunto as she may safely get." In the "berth place" it provides that "charterers have the "right to order the ship to load at two safe berths or loading "places." Leaving out of consideration for the time being the word "approved" (on which the plaintiffs found an argument), the defendants argue that they have the right, but not the obligation, to nominate a safe loading place. That does not mean, as I understand the argument, that under the charterparty the ship could be compelled to go to an unsafe loading place, but that the provision about safe loading places is in the nature of a condition precedent: if the charterer nominates an unsafe place, the ship is not obliged to go there, but cannot claim damages for any breach of obligation, because the charterparty merely gives the charterers a right to nominate and does not impose any duty upon them.

This appears to me, with respect, to be an impossible argument. There must be an obligation, express or implied, to nominate a loading place of some sort; if the ship is not told where to load she cannot earn her freight, and so, by failing to nominate or by nominating an obviously unsafe place the charterers could defeat the object of the charterparty without being liable to damages. There must, therefore, be an obligation to nominate at least one loading place, and there must be implicit in that some condition about safety to prevent the making of a derisory nomination. The obligation on the ship to proceed to a loading place "or so near thereunto as she may safely get" suggests strongly that the loading place itself must be safe. And when one finds the obligation on the charterers to nominate a loading place of some sort amplified by an express right to nominate one or two safe loading places, it does not require much effort of construction to conclude that any loading place which is nominated must be safe. I think, therefore, that this charterparty is to be read in just the same way as one in the more usual form which provides that the ship should proceed to a safe port and load at a safe berth. "Safe" in this context means, it is well settled, that the place must be safe for the particular ship chartered, at or about the time when she is to use it.

I think that the parties would probably have inserted the word "safe" in what I have called the "port place," if they had not used the word "approved." I do not think that this latter word has anything to do with the approval or disapproval of the parties themselves. I think that it means "approved" in the sense of being generally acceptable in the trade. No doubt a place would not be approved in this sense unless it was considered to be generally safe, but I do not think the expression can be construed as warranting safety for a particular ship at a particular time. I think that the word is used to give additional protection to the shipowner. It is intended to confine loading places to those that are recognized or regularly used, and to prevent the charterer naming any place anywhere, even though it is safe, at which he would like to load. Thus its use, I think, takes for granted that the approved place will be safe. Whether the use of the expression by itself would comprehend a warranty of safety I need not decide, since I am satisfied that this charterparty, construed as a whole in the way that I have already indicated, is to be read as if it referred to an approved and safe loading place as ordered in Newfoundland on the east coast.

The defendants put their point in two other ways. The first is based on a general proposition of law, which is that wherever a voyage charterer makes a nomination or gives an order which is beyond his powers under the charter, and the master obeys, he does so at his peril; he is free to disregard it, and if he chooses to obey, he must take the consequences. This proposition does not as a matter of law depend upon the actual knowledge or means of knowledge of the master, though it can perhaps be supported by the consideration that a master is likely to be more alive than the charterers to the dangers of a port or berth or to those that may arise from any other order affecting the navigation or management of the vessel. But as a matter of law in every case, whether the decision to obey or disobey involves maritime matters or turns on the construction of the charterparty, the proposition requires that the master must make up his own mind about it and make such inquiries as he thinks necessary for the purpose. Alternatively, it is contended that, on the facts of this case, the master had actual knowledge of the full position, did indeed believe that Tommy's Arm was dangerous and did make up his mind to berth, and that in such circumstances the plaintiffs cannot recover.

I shall consider first the proposition of law, which is very similar to one which I rejected, at least implicitly, in *G. W. Grace & Co. Ld.* v. *General Steam Navigation Co. Ld.*[1] I have been invited to reconsider that decision. I should of course have done so even if Mr. Carpmael's argument was the only novus actus interveniens, but in fact there has intervened also a very important decision of the High Court of Australia: in *Reardon Smith Line Ld.* v. *Australia Wheat Board*,[2] the High Court by a majority accepted the proposition which I rejected. The earlier authorities are so fully discussed in that case that I need not now do more than mention them. The view I formed is certainly inconsistent with the decision of Branson J. in *West (Samuel) Ld.* v. *Wright's (Colchester) Ld.*[3] and probably also with that of Bucknill J. in the *Pass of Leny*.[4] The contrary view is, I think, inconsistent with the decision of Roche J. in *Axel Brostrom & Son* v. *Louis Dreyfus & Co.*[5]: in this case the ship did not as a result of the compliance with the charterer's order incur physical damage, but she was held entitled to recover the cost of hiring tugs to avoid physical damage, which comes to the same thing. The contrary view is inconsistent also with several other earlier decisions unless they can be satisfactorily distinguished on the ground that they concerned a time charter and not a voyage charter; and the controversy in *Reardon Smith's* case[6] turned very largely on this point. There is nowhere any clear decision binding on me; and so Mr. Carpmael naturally relies strongly on the judgments of the High Court of Australia as affording the best guidance, while Mr. Roskill prays in aid the powerful dissenting judgment of Dixon C.J.

I have held that there was an obligation to nominate a safe port. It follows that it was broken by the nomination of an unsafe port. But the ship should, the defendants contend, have behaved in just the same way as she would perforce have done if no port had been nominated at all—that is to say, she should have done nothing and claimed damages for failure to nominate a safe port. Upon the nomination of an unsafe port the ship's duties, rights and remedies are, the defendants say, just the same as if no port had been nominated at all. There lies, I think, at the heart of the defendants' proposition this fundamental idea—that to do an act badly is the same thing for all the purposes of the law of contract as not to do it at all. There is no doubt that for *some* purposes of the law of contract that is so. An act or omission either complies with the contract or it does not; if it does not comply, it does not for some purposes matter whether the non-compliance is due to bungling or to inaction; to do the act improperly means that you have omitted to do the proper act. Thus in *Ogden* v. *Graham*,[7] where the charterers nominated an unsafe port, and the ship refused to go there, the ship recovered damages for detention on the basis that the charterers had failed to nominate a safe port within a reasonable time.

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[1] [1950] 2 K.B. 383; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201.

[2] [1954] 2 Lloyd's Rep. 148.

[3] (1935) 51 Ll.L.R. 105.

[4] (1936) 54 Ll.L.R. 288.

[5] (1932) 44 Ll.L.R. 136.

[6] [1954] 2 Lloyd's Rep. 148.

In the present case, the bad nomination of berth C had two qualities, one of which, on the defendants' argument, is relevant and the other irrelevant: in the first place (since it is not suggested that there was room for a second nomination within a reasonable time, even if the charterers could have made a better one), it marked the end of the period within which the charterers had undertaken to nominate a safe berth and so marked the point of time at which the breach arose; secondly, it invited the ship to an unsafe berth—the first is relevant, because the charterers had undertaken to nominate a safe berth and failed to do so; the second is irrelevant because the charterers had not undertaken not to invite the ship to an unsafe berth. The point is put by Webb J. and Taylor J., who formed the majority in *Reardon Smith's* case[8]: "There is, of course, ample authority for the "proposition that a failure or refusal, pursuant to such a pro-"vision, to designate a safe port will sound in damages, and "the nominating of an unsafe port may well be involved in such "a failure or refusal. But it by no means follows that where "the nominating of an unsafe port is involved in such a failure "or refusal the shipowner may recover not only the damages "which flow from the failure or refusal but also the damages "sustained by the vessel after proceeding to the designated port "and as the result of its unsafe nature or condition. Such "damages do not flow from a refusal to nominate a safe port."

It is true that a term in a contract must either be fulfilled or broken, and that an unsuccessful attempt to fulfil it is as much a breach as is refraining from any attempt at all. Neither is perfection, and in determining whether or not there is a breach the degree of imperfection is irrelevant. But that is not to say that it is irrelevant in determining what are the damages for the breach. A man who acts in purported fulfilment of a contract is not for this purpose doing the same thing as a man who does not act at all. For when he so acts, he at least represents that what he is doing is in accordance with his contract. In my judgment, he does more than represent, he warrants—or, it would be truer to say, he acts under a warranty he has already given, that what he does will be in accordance with his contract.

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[7] (1861) 1 B. & S. 773.

[8] [1954] 2 Lloyd's Rep. 148, 162.

Let me illustrate this by reference to a simple contract for the sale of goods. If a seller agrees to deliver 1 lb. of first quality beans and tenders second quality beans, it is a bad tender and the buyer can reject it. But the buyer can also accept it and sue for damages for breach of warranty. It is not then open to the seller to say: "My tender was a bad one; it is just the "same as if I had never tendered at all; I am still within the "contract time and I now propose to make a good delivery." Nor could he successfully contend that the measure of damages was that appropriate to non-delivery. Nor can he say: "I agreed "to deliver first quality beans, but I never warranted that I "would not tender second quality beans." He cannot say that, because he did in truth warrant that the beans he tendered would be first quality and that is why he is being sued for breach of warranty. A promise to deliver 1 lb. of first quality beans is just the same as a promise to deliver 1 lb. of beans, warranted first quality only. Likewise, an obligation to order a vessel to a safe port on the east coast of Newfoundland is just the same as an obligation to order a vessel to a port on the east coast of Newfoundland, warranted safe. There is no magic in the word "warranted"; every term in a contract is at heart a warranty. And if this charterparty had in terms warranted that Tommy's Arm was safe, I do not suppose that anyone would ever have thought of arguing that the ship could not proceed there and obtain damages if it was not safe.

Thus the defendants' proposition is one that strikes at the root of a fundamental principle in the law of contract. There *is* a difference between a contractor who does not discharge his obligation at all and one who does so imperfectly. In the latter case, the contract gives the other party the right to elect to treat the imperfect performance as if it were a fulfilment of the contract (even if he knows that in fact it is not), and to claim damages if any result from the imperfection. This is a right which is, I think, common to every class of contract. The general principle is that the other party is entitled to proceed just as he would have done if the contract had been properly fulfilled, and the risk of any damage that flows from that must be borne by the wrongdoer.

I think, therefore, that the real question is not so much whether a distinction can be drawn between a voyage and a time charter, as whether any charterparty, whether for voyage or for time, is exempt from the application of the ordinary law of contract. I see no reason in principle why it should be, and I do not think that business convenience requires it. Indeed, I think business, whether maritime or otherwise, might be gravely impeded if the ordinary principle were not allowed to operate freely—and by the ordinary principle I mean that, generally speaking, a man is entitled to act in the faith that the other party to a contract is carrying out his part of it properly. It does not lie in the mouth of the promisor to say that a promisee has no right to assume that a promise has been faithfully carried out and should make his own inquiries to see whether it is or not. If everything done under contract has to be scrutinized and tested by the other party before he can safely act upon it, many transactions might be seriously held up—in doubtful cases, perhaps indefinitely. Even if the breach is clear, it is vital to the proper conduct of business that the promisee should be able, if he considers the breach a minor one, to proceed without sacrificing his right to be indemnified. That is just as important in a voyage charterparty as in any other sort of business. Suppose that the master thinks that the nominated berth is barely large enough and that he might scrape his vessel's sides and damage her paintwork. If (as is the case here) it is the only berth that can be nominated, is he to throw up the voyage? I am not asked to assess the damages in this case, so I do not know what was the cost of repairing the *Stork*. But it is certain that if the ship had sailed away from Tommy's Arm without carrying her freight, the cost of the time lost would have been considerable. It is possible even in this case that a prudent master, without knowing for certain whether he was right or not and so acting in the interests of all concerned, might have felt that the risk of damage to the vessel's bottom was outweighed by the certainty of time lost. A master under a voyage charterparty is often confronted with this sort of problem, as, for example, when he has to decide whether to accept or reject cargo that may be dangerous, and there are, of course, many cases in which the ship has recovered for damage done to her by dangerous cargo.

To deny the defendants' proposition does not mean that a master can enter ports that are obviously unsafe and then charge the charterers with damage done. The damages for any breach of warranty are always limited to the natural and probable consequences. The point then becomes one of remoteness of damage; or if it is thought better to put it in Latin, the expressions novus actus interveniens and volenti non fit injuria are ready to hand. There is also the rule that an aggrieved party must act reasonably and try to minimize his damage. A master who entered a berth which he knew to be unsafe (and which perhaps the charterer had nominated in ignorance of its condition) rather than ask for another nomination and seek compensation for any time lost by damages for detention, might find himself in trouble. So might a master who sought compensation for the time lost in sailing back across the Atlantic because he had not cared to risk damage to his paintwork.

If I may return to the case of the sale of goods, from which I have already drawn an analogy, in a proper case in which sub-sales are contemplated the plaintiff may recover as part of his damages his liability to a third party: but if he passed on to a third party goods which he knew to be dangerous or defective, or if he incurred damage himself by recklessly using such goods, he could not claim to be reimbursed: see *British Oil and Cake Co. Ld.* v. *Burstall & Co.*,[9] *per* Rowlatt J., and *Dobell (G. C.) & Co. Ld.* v. *Barber & Garratt*,[10] *per* Lawrence L.J. Again in *Kruger & Co. Ld.* v. *Moel Tryvan Ship Co. Ld.*,[11] Lord Halsbury, speaking of the obligation put by the charterparty in that case on the master to sign bills of lading, said [12]: "If the bill of lading "tendered is manifestly inconsistent with the charterparty, it "would be his duty to refuse."

Of course, cases at either extreme are easy to solve. The difficult ones are those in which the risk is doubtful or the danger concealed. There is a tendency in such a case, as I have noted earlier, to feel that the master is often better equipped than the charterers to deal with such a situation. But the solution must be found in the parties' own agreement. As Dixon C.J. pointed out in *Reardon Smith's* case,[13] the charterer can, if he likes, name the loading place in the contract and then the shipowner must satisfy himself about its safety; if the charterer wants the advantage of naming, generally at the last moment, a place of his own choice, it is fair that he should take the responsibility of seeing that it is safe.

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[9] (1923) 39 T.L.R. 406, 407.

[10] [1931] 1 K.B. 219, 238; 47 T.L.R. 66.

[11] [1907] A.C. 272; 23 T.L.R. 677.

[12] [1907] A.C. 278.

[13] [1954] 2 Lloyd's Rep. 148.

I turn now to the third way in which the point is put, which is in effect that this is a case of volenti non fit injuria. On the facts I do not think that it is. The defendants rely upon the master's admission that on October 25 he came to the conclusion that Tommy's Arm was not a safe anchorage; and after he had moored again on October 26 he wrote to his owners: "This is "a very dangerous place in the winter for steamers of our size "and I hope we may be fortunate enough to load quickly without "bad weather." In his evidence, he said that he was in a dilemma; he could not foresee that the wind would blow with such force and he could not delay the ship.

It is clear, therefore, that the master had substantial fears and that he allowed them to be overridden. I do not think that in making his choice in what he truly says was something of a dilemma he was acting in a foolhardy or unreasonable way. The defendants rightly emphasize that he had had, so to speak, a trial trip on October 25, and yet decided to enter again. Nevertheless, the safety of a place like Tommy's Arm cannot be judged entirely by appearance; it must depend on the sort of weather conditions that are likely to be experienced. It is peculiarly a case in which a master, whatever his own feelings, might think it wise to defer to those with local experience. The pilot gave evidence of his conversation with the master when they first entered on October 25: "When we got going to "Tommy's Arm he said the chart looked small. I said no doubt "it did, to a great many men, look small, but don't get worried, "just leave it to me and nothing will happen to your ship going "in there." Later he said that he told the master: "I have "brought ships in here so large as this one and I know it looks "funny to you but we have nothing to worry about."

I find, therefore, that there was a warranty of safety of Tommy's Arm, that it was broken and that the damage to the *Stork* was the natural and probable consequence of the breach. There must therefore be judgment for damages to be ascertained upon inquiry.

The incident of October 25 has given rise to a minor claim put forward by the plaintiffs. They say that as a result of it they lost a day for which they are entitled to be compensated. If I found that the *Stork's* failure to moor on that day was due to the negligence of the defendant's servants, the loss of the day might have been a consequence of it. In the absence of such a finding and on the basis that the incident was due to a mishap, the plaintiffs say that they are entitled to recover in that the port was not safe at the time of the ship's arrival. It is common ground that she was prevented from mooring that day because of the easterly wind. The law does not require the port to be safe at the very time of the vessel's arrival. Just as she may encounter wind and weather conditions which delay her on her voyage to the loading port, so she may encounter similar conditions which delay her entry into the port and the charterer is no more responsible for the one than for the other. If the wind and weather conditions are such as to affect the character of the port, as in *Johnston Brothers* v. *Saxon Queen S.S. Co.*,[14] the position may be different. If the evidence in the present case showed that the weather to be expected at this time of year was such as might, in effect, close the port to vessels of the size of the *Stork* for a substantial period, the plaintiffs' argument might succeed. But the evidence falls far short of that and the delay actually occasioned was only one day. In my judgment this part of the claim fails.

Judgment for the plaintiffs.

J. D. P.

The defendant charterers appealed.

K. S. Carpmael Q.C. and *T. G. Roche* for the charterers. Whereas in a time charter there is the usual indemnity clause, and if the vessel is ordered to an unsafe port and she suffers damage the charterer is liable, in a voyage charter the shipowner has to satisfy himself as to the safety of the port to which his vessel is ordered, and if it is unsafe he has only to go as near thereto as he may safely get. The trial judge has found that Tommy's Arm was unsafe, that the ship dragged her anchors because there was insufficient room in the berth for her to pay out a sufficient length of cable. For the purpose of this appeal the charterers accept that the vessel dragged her anchors, but it is submitted that it was the duty of the master to decide how much cable should be paid out and to see that sufficient cable was paid out. It is further submitted that another 100 to 150 feet of cable could have been paid out and that if it had been the damage to the vessel would have been avoided. The master was entitled to take the assistance of Watkins, the pilot, but he remained responsible for the safety of his vessel.

[14] (1913) 108 L.T. 564.

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Under the charterparty there was no warranty of safety. The only duty of the charterers was to provide an approved loading place. If an unsafe port is nominated there is no compulsion on the ship to go there. The master, in a letter to his owners, described Tommy's Arm as dangerous for a ship of the size of the *Stork*, yet he accepted the risk and therefore the question of volenti or novus actus interveniens arises.

The second part of clause 1 of the charterparty gives the charterer an option, and he not having exercised it the words should be ignored and the question of safety did not enter the contract.

The charterers having nominated an approved loading place and the shipowners having approved it, the charterers have done their duty. The shipowner is not bound to comply with the nomination of a loading place by the charterers, and he is always under a duty to mitigate any damages which might result from compliance. He must not deliberately or unnecessarily run into danger and the charterparty gives him an alternative.

[Singleton L.J. Is there any finding by the trial judge that the master acted reasonably?]

He said that the master was not guilty of negligence or imprudence. It is not contended that the master negligently ran into danger, but that he deliberately did so. The plaintiffs have to show that the *Stork* could not lie in Tommy's Arm in safety, and it is submitted that they have failed to do so. If, at the time of making the charterparty, the shipowners did not know the nominated port it was their duty to make inquiries as to its character, or they took the risk.

[Singleton L.J. If you were under a duty to nominate a safe loading place what did that mean?]

Safe, it is submitted, in regard to weather reasonably to be expected at that time of the year. It is getting near "reasonably "safe." As to the meaning of "safe," see Scrutton on Charterparties, 15th ed., pp. 121 and 151, and Carver's Carriage of Goods by Sea, 9th ed., p. 685. [*Ogden* v. *Graham*,[1] *Hall S.S. Co. Ld.* v. *R. & W. Paul Ld.*[2] and *Axel Brostrom & Son* v. *Louis Dreyfus & Co.*[3] were also referred to.]

As to the meaning of "approved," no guidance can be gained from cases on bills of exchange or like documents. It is therefore necessary to interpret what the parties meant by that phrase. Although it is the charterers' form in the first place, both parties agreed that the *Stork* should proceed to Tommy's Arm and when that nomination was accepted by the shipowners that became the "approved" loading place. It would be wrong in the circumstances to bring in any implied term under, for example, the principle of *The Moorcock*,[4] to give business efficacy to the contract. The shipowners were entitled to disapprove this particular nomination. They did not and therefore they approved the port. It is said by the shipowners that even if Tommy's Arm was safe, yet there must be a measure of doubt, so that a reasonable man would not reasonably approve of it. But if it was safe no reasonable objection could be taken to it. The trial judge has reaffirmed his own decision in *G. W. Grace & Co. Ld.* v. *General Steam Navigation Co. Ld.*[5] and in effect held that Branson J. in *West (Samuel) Ld.* v. *Wright's (Colchester) Ld.*,[6] Bucknill J. in the *Pass of Leny*[7] and Greer L.J. in *Lensen Shipping Co.* v. *Anglo-Soviet Shipping Co.*[8] came to wrong conclusions. The judgment in *Grace's* case[5] is in opposition to the majority judgments in *Reardon Smith Line Ld.* v. *Australian Wheat Board*,[9] in which the court by a majority adopted the observations of Branson J. in *West's* case[6] and of Greer L.J. in the *Lensen* case,[8] and held that where, under a charterparty in the form there under consideration, an unsafe port or berth was nominated by the charterer he did not, merely by reason of such nomination, become liable for damages sustained as a result of the master proceeding to such unsafe port or berth. The High Court of Australia held that the charterer was not liable and declined to apply the decision in *Grace's* case.[10]

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[1] (1861) 1 B. & S. 773.

[2] (1914) 19 Com.Cas. 384.

[3] (1932) 38 Com.Cas. 79.

This court has said that there might be cases in which the charterers were innocent of any intention to break the contract and where the master deliberately decided to enter a port which he knew to be unsafe. This court has further stated that the giving of an order did not necessarily cause the damage that flowed from an act done in pursuance of it, and the decision of the master to obey the order might in certain circumstances amount to a novus actus interveniens. On the facts of the present case it is established that Tommy's Arm was a safe port and that

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[4] (1884) 14 P.D. 64.

[5] [1950] 2 K.B. 383; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201.

[6] (1935) 40 Com.Cas. 186.

[7] (1936) 54 Ll.L.R. 288.

[8] (1935) 40 Com.Cas. 320; 52 Ll. L.R. 141.

[9] [1954] 2 Lloyd's Rep. 148.

[10] [1950] 2 K.B. 383.

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but for the unwise steps taken by the master no damage would have resulted. The shipowners accepted the port and sent the ship there. By so doing they represented to the charterers that they accepted it as a good nomination. The master, with full knowledge, accepted the berth as a good berth, and the charterers having acted to their detriment in starting to provide cargo the shipowners were estopped from claiming damages.

Eustace W. Roskill Q.C. and *H. V. Brandon* for the shipowners. The decision of the trial judge was right on every point except, possibly, as to the meaning of "approved." He was completely right in the view he took of the facts and of the law. In the last few years the law in regard to charterparties has become very complicated, but this court is asked to accept the judgment of Devlin J. in toto, for that judgment, coupled with his judgment in the *Grace* case,[11] has gone a long way to remove doubt as to what is the law and to put matters back on a proper footing. There are three questions for decision: (1) What was the promise in the contract? (2) Was that promise broken? (3) Did the damages claimed directly flow from that breach? The judge rendered invaluable service to the commercial community in getting the matter back to a simple principle, disposing of arguments based on the majority judgments in *Reardon Smith Line Ld.* v. *Australian Wheat Board*,[12] and cutting away an artificial distinction, if any such existed, between time and voyage charterparties. There is no logical distinction between a time charter and a voyage charter.

The crucial question is: Do the words of clause 1 amount to a warranty that the nominated loading place will be safe? There is not only a right to nominate but an obligation to do so. That arises from the fact that the ship has to go to the nominated place in order to take in such cargo as the charterers may load on board and to earn freight. It is submitted that on the authorities there is an express warranty that the berth or loading place will be safe. If that is wrong, then the court will imply a term that one berth has got to be safe. A test of whether a port or loading place is safe is whether it is safe for the particular ship which has to load there: *Axel Brostrom & Son* v. *Louis Dreyfus & Co.*[13]

Devlin J. refused to follow the decision of Branson J. in *West (Samuel) Ld.* v. *Wright's (Colchester) Ld.*,[14] and of Greer L.J.

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[11] [1950] 2 K.B. 383.

[12] [1954] 2 Lloyd's Rep. 148.

[13] 38 Com.Cas. 79.

[14] 40 Com.Cas. 186.

in the *Lensen* case [15]; and it is submitted that the decision of Bucknill J. in the *Pass of Leny* [16] was also wrong or is distinguishable. Under any form of charterparty, whether time or voyage, there is an obligation on the charterers, and a right, to give certain orders. If they give an order which is outside the limits of the terms of the charter it is a breach of the charterparty and damages are recoverable in the ordinary way. The decision of the majority in the *Reardon Smith Line* case [17] does not, it is submitted, stand up to close analysis. The judges appear to be saying that if the charterers nominate an unsafe port the only remedy of the master is not to go to the port; that although there is a duty not to nominate an unsafe port, if the master goes to it his blood is on his own head. The majority judges failed to appreciate correctly the finding of Branson J. in *West's* case.[18] The very powerful judgment of Dixon C.J. in the *Reardon Smith Line* case [17] is adopted by the plaintiffs. The defendants have argued the question of volenti, but it is submitted that where there is a duty under a contract then the knowledge or wish or mind of the master cannot form a defence to a breach of that duty. The point is not volenti, but is remoteness of damage or failure to mitigate. The damage which the shipowners claim clearly resulted from the charterers' breach of duty. That is a question of fact for the tribunal, and the judge has held that the master acted reasonably and that the damage flowed from the breach. It is for the charterers to prove that the judge was wrong. He was right and the appeal should fail.

[The following cases were referred to: *Kruger & Co. Ld.* v. *Moel Tryvan Ship Co. Ld.*[19]; *Strathlorne S.S. Co. Ld.* v. *Andrew Weir & Co.*[20]; *Scott* v. *Barclays Bank.*[21]]

Carpmael Q.C. replied.

Cur. adv. vult.

1955. April 5. The following judgments were read.

SINGLETON L.J., having read the statement of facts as found by Devlin J., continued: At the conclusion of the hearing the judge found that the shipowners were entitled to recover damages against the charterers, and he gave judgment accordingly, with damages to be ascertained upon inquiry. The charterers appeal

[15] 40 Com.Cas. 320.

[16] 54 Ll.L.R. 288.

[17] [1954] 2 Lloyd's Rep. 148.

[18] 40 Com.Cas. 186.

[19] [1907] A.C. 272; 23 T.L.R. 677.

[20] (1934) 39 Com.Cas. 318; affirmed 40 Com.Cas. 168.

[21] [1923] 2 K.B. 1; 39 T.L.R. 198.

against that judgment. The rights of the parties are to be determined by the contract between them, and that is contained in the charterparty of October 17, 1951, which is headed "Pulp-"wood Charter—From Newfoundland and Eastern Canada." It is an extraordinary document, to say the least.

In the course of their business Bowaters collect pulpwood at places on the east coast of Canada and in Newfoundland, which places cannot properly be described as ports. Thus this form of charter requires that the vessel shall sail and "proceed to not "more than two approved loading places as ordered . . . or so "near thereunto as she may safely get and there load . . ." It appears to me that "loading place" in this context is used instead of the word "port" by reason of the nature of the places at which Bowaters collect pulpwood for transport to this country. The word "approved" must mean approved generally in the trade or business. To say that it means no more than approved by the parties, or, in other words, agreed between them, has the effect of depriving the word of any meaning in this setting. The charterers have the right to nominate not more than two approved loading places *as ordered*. It is for the charterers to nominate an approved loading place. A loading place would not be approved in the trade unless it was satisfactory, and no loading place is satisfactory unless it is recognized as normally safe for a ship of the size for which it is nominated.

On or about the date of the charterparty the charterers nominated Tommy's Arm as the loading place. It has been used by them for a number of years and, though only one ship equal in size to the *Stork* had been there to load, many ships had loaded cargoes of pulpwood there. I do not think that it can be said to have been shown that Tommy's Arm was not an approved loading place within the meaning of the words in the first part of clause 1 of the charterparty. The charterers contend that their duty was fulfilled by the nomination of Tommy's Arm. This overlooks later words in the charterparty, apart from some general considerations which might be raised. The words to which I refer are: "charterers have the right to order the ship "to load at two safe berths or loading places or at one safe berth "or loading place combined with one safe anchorage in the same "loading place without extra freight." The use of the words "loading place" a second time is unfortunate. It is clear, however, that it is used in the same sense as "berth," and from that I conclude that it is used in a different sense from that in which it is used in the first part of clause 1 of the charterparty.

The charterers claim that they are given an option by these later words, and that, as they did not exercise the option, the words should be ignored. And it is said that the charterers have the right to nominate a berth, which need not be a safe berth, and only if they exercise their right to order the ship to load at two berths or loading places does the element of safety enter into it. This form of charter has been used for some time, and it seems to have been amended on at least two occasions. It is a little surprising to me that it should be argued on behalf of Bowaters that on their form there is no obligation as to safety of the berth to which they direct the chartered ship. The word " safe " appears four times in clause 1. The ordinary man may find it difficult to understand why safety should be required if two berths or loading places are designated and yet there should be no requirement if only one is named. The ship must be told where to pick up the cargo. It is both the right and the duty of the charterers to give the necessary instruction, else the ship cannot earn freight. There is no time stated within which the option is to be exercised and, so far as I can see, the charterers might order the ship to proceed to a second berth or loading place after she had taken aboard the cargo available at the first.

I draw attention to a passage in the letter of October 26 from the master to the owners' agents. The passage is: " According to " advice I had from the agent, we shall take all our cargo here, " in which case I figure that the fuel oil will be enough and that " I shall not have to put into St. John, which call at St. John " I had in mind on the assumption that we would also load at a " second place, and that is why I wrote you regarding fuel. We " hope to complete loading by November 7, weather permitting." This may well apply to " port " as distinct from " loading place " within the port," but it is not limited to that. The master had, obviously, been uncertain as to whether he would have to move or not. On the charterers' argument, what would be the position in such a case? Is the second loading place to be regarded as in a different category from the first—a requirement as to safety applying to one and not to the other? This will not do. If it is said that there is no provision that one berth or loading place ordered shall be safe, the reply is that the words of this clause make it a necessary implication. Otherwise the introduction of the word " safe " before " berths or loading places," and again before " berth or loading place," becomes illusory. I am satisfied that under this charterparty there was a duty upon the charterers to nominate a safe berth or loading place.

[His Lordship referred to the evidence and to the conclusion of Devlin J. that more chain could not have been paid out or, if it could, that there was no negligence on the part of the master in not insisting on it and continued:] I agree with the findings of the judge. Of course the master is in charge of the ship; it may be that his impression that there was no room for more anchor chain arose from the fact deposed to by Watkins and by the master that they had gone as close to the boom as they could before the starboard anchor was dropped. No doubt extra chain out would have been a help, but it is difficult to say how far this goes. The wind was partly across and the increase in the hold would not be as great as in the case of a ship riding on her anchors.

Devlin J. found that the loading place was unsafe. He said: "I think the most important single fact to be determined is "whether or not the *Stork* dragged her anchors during the "night of the 29th. If the [owners] can establish that she did "and that as a consequence of the anchors dragging she moved "120 feet or more, they are well on the way to establishing that "the berth where she was moored was not safe. If a vessel "drags her anchors in the open sea not much harm may result. "But if she drags her anchors in a confined space such as "Tommy's Arm, it is a different matter; the safety of her berth "very largely depends on her being held there securely." After reviewing the evidence the judge found that the vessel did drag her anchors during the night. This finding was not contested by the charterers on the appeal, nor did they seek to say that the master was wrong in moving the ship. There was other evidence on the question as to whether berth C was a safe loading place—evidence both ways. It was a question of fact for the judge to determine upon the evidence. Obviously he attached importance to the fact that a large number of ships had used it without mishap. Only one of a size equal to that of the *Stork* had used Tommy's Arm. His finding is stated in this way: "I therefore find that the master was not guilty of any "of the negligence charged or of any imprudence and that the "loading place was unsafe." Nothing in the argument addressed to the court, or in the evidence given below, leads me to think that the finding that the loading place was unsafe is wrong. This court ought to accept it.

It is submitted on behalf of the charterers that even if the nominated loading place (or the port) is unsafe the shipowners

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cannot recover damages as the master knew the risk and undertook it. He, it is said, was in charge of the ship; he could see the position; he need not have taken the ship into berth C; he did so with his eyes open. I do not consider that this is an answer to the claim. It is clear that the master had fears, but he was reassured. He was told by Watkins that he, Watkins, had berthed many ships there and that there was no reason to be afraid. It is unnecessary to refer in detail to the evidence of the master as his view is correctly stated in his letter to the owners (or their agents) dated October 26, 1951. The master wrote: "I beg to advise that we arrived here yesterday afternoon "from Port Alfred, Our average speed to this point was 11.30 "knots and we arrived with surplus fuel 316 tons. No sooner "had the pilot boarded the ship than very strong wind started "to blow, and after anchoring in the port we found it impossible "to make fast our moorings. The bay here is so narrow, with "rocks flanking both sides, the ship cannot turn round when "the wind blows, there is no tug or other means available for "assistance in making fast. We succeeded to swing her round "without damage and shifted the ship to a bay five miles away. "Today we returned and after anchoring made our moorings fast "to trees and rocks. This is a very dangerous place in the winter "for steamers of our size and I hope we may be fortunate enough "to load quickly without bad weather. . . ." That is the letter which contained the concluding line: "We hope to complete "loading by November 7, weather permitting."

The master of a ship is placed in great difficulty when he is confronted with such a situation. His duty to his owners and employers is to fulfil the terms of the contract if it is feasible so to do. At the same time he does not wish to risk the loss of his ship. The loss of freight (with possible litigation) weighs on one side against the risk of damage to, or loss of, the ship on the other side. Moreover, one who has never been there before cannot fully appreciate all the risks. Surely he is entitled to place reliance on the assurance given him by the very experienced pilot who was sent by the defendants to meet him. The doctrine of volenti non fit injuria does not apply.

I now have to deal with a question of law which has given rise to much discussion over a number of years. Assuming: (1) That there was a duty on the charterers to nominate a safe loading place; (2) that the charterers nominated a loading place which was unsafe; and (3) that the ship went to that loading place and suffered damage by reason of the fact that the loading place was unsafe, can the shipowners recover against the charterers the damages so suffered? It is said on behalf of the charterers that such damages cannot be recovered in the case of a voyage charter, though other considerations arise in the case of a time charter. I do not see any necessity to bring in time charters. The distinction, such as it is, between the two is not that one is a time charter and the other a voyage charter but that the terms of the one are normally different from those of the other type. In the case of a time charter the master usually has to obey the orders of the charterers, and the owners have an indemnity in the case of damage arising therefrom. I prefer to keep to this case in which we are dealing with a voyage charter, though one which is somewhat unusual, as I have already pointed out.

The nomination of an unsafe loading place is just as much a breach of contract as is the failure to nominate one. It is a breach of duty arising out of the obligations undertaken. If no loading place is nominated the charterers may be faced with a claim for damages for loss of freight. If a loading place which is unsafe is nominated the master is not bound to take his ship thereto. His state of knowledge is important. He is sometimes on the horns of a dilemma. The material question is, I believe, whether he acted reasonably. The judge was of the opinion that the master, in accepting the assurances given to him, acted reasonably, and I share his view. It is to be remembered that the parties were in contractual relationship. The charterers, in nominating berth C, purported to be acting in pursuance of a duty under the charterparty. They expected the master to take his ship to the place they nominated. In their view it was incumbent on the master so to do, and it was the only way in which the ship could earn freight—for their case throughout was that the place nominated was safe.

I do not propose to enter upon a review of the authorities upon this subject. That has frequently been done in recent years. I would, however, feel surprised, if the charterers' argument is sound, that the point was not mentioned in *Axel Brostrom & Son* v. *Louis Dreyfus & Co.*,[1] before Roche J. It appears to have been assumed by everyone that on the facts found the damages were recoverable.

Devlin J. held that the damages sustained by the *Stork* through the nomination of an unsafe berth to which she had gone

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[1] (1932) 38 Com.Cas. 79; 44 Ll.L.R. 136.

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under the nomination were recoverable against the charterers. The judge followed in effect a view he had expressed in *G. W. Grace & Co. Ld.* v. *General Steam Navigation Co. Ld.*,[2] in which he said[3]: "Once the breach of contract is established, it seems "to me to follow that, subject to the ordinary rule of remoteness, "damages must result. There may be cases in which the "charterer is innocent of any intention to break the contract and "where the master deliberately decides to enter a port which "he knows to be unsafe. Roche J., on a rather similar point in "*Portsmouth Steamship Co. Ld.* v. *Liverpool and Glasgow* "*Salvage Association*,[4] indicated that the master should not "follow the instructions of the charterer if they led to obvious "danger. But these factors go to the question of causation "only. The giving of an order does not necessarily cause the "damage that flows from an act done in pursuance of it. Put "more specifically, the decision of the master to obey the order "may in certain circumstances amount to a novus actus interveniens. But, in the circumstances of this case, the arbitrator "clearly regarded the acts of the master as done in the ordinary "course of things and not blameworthy: he was doing what any "intelligent observer, knowing exactly how he was circumstanced, would have expected him to do. I take these phrases "from the speech of Lord Wright in *Summers* v. *Salford Corporation*.[5] The facts set out in the special case fully justify "this conclusion."

Between the two decisions of Devlin J. there came *Reardon Smith Line Ld.* v. *Australian Wheat Board*[6] in the High Court of Australia. This was an appeal from a decision of Woolf J. (Western Australia), who had held that charterers were in breach of the charter in ordering the ship to a berth which they knew, or ought to have known, was unsafe; that the master acted reasonably in going to the berth; and that charterers were liable to the shipowners for the damage sustained by the ship. The charterers appealed, and the appeal was allowed by a majority, Dixon C.J. dissenting. The many authorities were fully considered in the judgments which were given.

The view of the majority, Webb and Taylor JJ., is expressed at the end of their judgment in these words[7]: "We have been "unable to find any case where, in the circumstances such as

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[2] [1950] 2 K.B. 383; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201.

[3] [1950] 2 K.B. 383, 397.

[4] (1929) 34 Ll.L.R. 459.

[5] [1943] A.C. 283, 296.

[6] [1954] 2 Lloyd's Rep. 148.

[7] Ibid. 166.

"the present, a charterer has been held to warrant the safety "of a port nominated by him, or where the nomination of an "unsafe loading port or berth pursuant to a charterparty in the "form of that which is before us has been held to constitute a "breach of contract giving rise to damages where the master of "a vessel has accepted the order and proceeded to the port and "there sustained damage. There is, as we have already said, "no doubt that a refusal or failure to provide the stipulated "cargo at a safe port is answerable in damages, but such a "conclusion depends upon principles which do not assist in the "solution of the problem which arises in this case. In all the "circumstances we prefer to adopt the observations of Greer "L.J. in the *Lensen* case[8] rather than those of Branson J. in "*West's* case[9] supra, and those of Devlin J. in *Grace's* case,[10] "and to hold that where under a charterparty in the form of "that which is before us an unsafe port or berth is nominated "by the charterer, he does not, merely by reason of such "nomination, become liable for damages sustained as a result "of the master proceeding to such unsafe port or berth. Nor "do we think that in the circumstances of this case there is any "other ground upon which the charterer should be held liable. "Accordingly we are of the opinion that the appeal should be "allowed."

I now take two passages from the judgment of the Chief Justice. The first[11]: "It is, of course, true that, since a "charterparty is a contract the terms of which depend on what "the parties write into it, each charterparty must bear its own "interpretation and its meaning must be derived from the full "contents of the document, and it is true that a time charter "often contains clauses absent from a voyage charter such as "a clause of indemnity and a clause enabling the charterer to "give orders as to the employment of the ship. But I can see "no reason why, in a voyage charter as well as in a time charter, "the traditional provision that the ship shall proceed to a safe "port as ordered by the charterer or to a safe wharf, dock or "berth, as ordered by the charterer, should not be interpreted "as imposing on the charterer an obligation to direct the ship "only to a port or dock that is safe. No doubt it is one aspect "of a total obligation resting on the charterer to provide a cargo "at a safe port or safe berth to which he is to order the ship to

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[8] (1935) 40 Com.Cas. 320; 52 Ll.L.R. 141.

[9] (1935) 40 Com.Cas. 186.

[10] [1950] 2 K.B. 383.

[11] [1954] 2 Lloyd's Rep. 148, 157.

"proceed. But it does not follow that the breach of the obligation must be regarded always as consisting in the failure to "supply the cargo at a safe port rather than in the sending of "the ship to a port which is unsafe. The shipowner may reject "the performance tendered of the obligation to provide a cargo "and thus avoid danger to the ship at the expense of the loss "of freight, and his measure of damages will be determined "accordingly. But he may accept the cargo though tendered "in breach of the condition that it will be done at a safe port "without relieving the charterer from the consequences, if they "ensue, of his breach of that condition. Indeed, that is the "very point decided in *Hall Brothers Steamship Co. Ld.* v. "*R. & W. Paul Ld.*[12] The purpose of the provision is to protect "the ship in both aspects. For these reasons I am of opinion "that the charterer is liable under the Australian Grain Charter "to the shipowner for damage received by the ship owing to "being directed to an unsafe port or an unsafe wharf for "loading."

The second passage I take from the judgment of the Chief Justice is[13]: "It was then contended that the damage to the "ship was not the natural or probable consequence of her "being ordered to the berth. The chain of causation was "broken, it was suggested, because the decision of the master "to rely upon the fine weather and not to put out a "stream anchor intervened. The master knew the berth to "be unsafe, so it was said, or liable to become unsafe on a "change of weather. His action in going to the berth with that "knowledge, it was said, was the true cause of the damage. I "do not think that this view can be supported. The purpose "of requiring the charterer to choose a safe port or berth is to "avoid danger to the ship. By ordering the ship to an unsafe "berth the charterer placed the master in a dilemma, and the "master's acquiescence in the order cannot relieve the charterer "of his responsibility. If it is material the charterer may be "taken to have known as much about the matter as the master. "The charterer was represented by an agent who took charge "of the loading and had the same opportunities for knowledge "as the master. The master was guided by the harbour-master "pilot who did not advise any other measures. In these circumstances, it is difficult to see why the course which was taken "was not a direct and natural consequence of the breach of the

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[12] (1914) 30 T.L.R. 598; 19 Com. Cas. 384.

[13] [1954] 2 Lloyd's Rep. 148, 158.

" provision of the charter in giving an order to go to the berth " at Geraldton. In my opinion, the judgment of Woolf J. is " correct and the appeal should be dismissed."

I agree with the reasoning of the Chief Justice and with that of Devlin J. I will state the position in my own way. If charterers nominate a loading place they expect that the master of the ship will take the ship to that place; that is what happens in the ordinary case, though there are cases in which the master, for reasons which seem right to him, declines to go there. The parties are in contractual relationship; the charterers wish their goods to be loaded into the ship and carried away; the shipowners wish to earn freight. The judge was satisfied that the master acted reasonably. The assurances given to him by the very experienced man the charterers sent to meet him satisfied him that he ought to proceed; thereafter " he was doing what " any intelligent observer knowing how he was circumstanced " would have expected him to do." And he was doing what the charterers wished and expected him to do to perform the shipowners' part of the contract, he believing, on the assurances given to him, that the charterers in performance of their contract had designated, or had directed him to, a safe loading place. The damages flowed naturally from the charterers' breach of contract.

It appears to me that this point is covered by the well-known words of Alderson B. in *Hadley* v. *Baxendale* [14]: " Now we " think the proper rule in such a case as the present is this:— " Where two parties have made a contract which one of them " has broken, the damages which the other party ought to " receive in respect of such breach of contract should be such " as may fairly and reasonably be considered either arising " naturally, i.e., according to the usual course of things, from " such breach of contract itself, or such as may reasonably be " supposed to have been in the contemplation of both parties, " at the time they made the contract, as the probable result of " the breach of it."

The damages sustained in this case fall under one, or under both, of the limbs of the rule there stated. Berth C was an unsafe berth for a ship of the size of the *Stork*. There was little room for manoeuvre, and there were rocks on every side; if she dragged her anchors the outlock was poor. These considerations were in the mind of the master throughout the night of October

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[14] (1854) 9 Ex. 341, 354.

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29/30, and in the early morning of October 30, when he decided to move. Similar thoughts must have been present to the mind of Capt. Miller, who remained on board until 6 a.m., though he was not so fearful of danger as the master then was. The kind of damage suffered in this case must be in contemplation of the parties whenever there is a charter of a ship. The shipowners know and appreciate the risks of the sea. The reasons for the promise of a safe berth (as there is in most cases) are (a) that without such a promise there might well be no contract; (b) that the master at a later stage might decline to go to the nominated berth; or (c) that at least there might be delay while the master investigated the position. Both parties realise that damage, such as occurred in this case, is to be expected if a ship is directed to a berth which is unsafe for her when in the contract there is a promise of a safe berth.

If a repairer agrees to repair my motor-car and does not do so within the time agreed or within a reasonable time I may succeed in an action for damages against him. If he repairs it indifferently and I suffer injury therefrom, equally I can recover damages. I have done what he would have expected me to do. The damage is the natural and probable result of the faulty repair. It may be that an action would arise on negligence as well, but it arises from the contractual relationship between the parties. The indifferent or bad performance gives a right of action just as much as does failure to perform. If I may carry the illustration further, suppose I notice, when my motor-car is returned, that the repair does not appear to have been well done, and I point this out to the repairer, who reassures me, asserting that the car is as good as it ever was and is perfectly sound as the result of the repair. If an accident occurs and I suffer damage through the faulty repair, can I recover damages? The answer depends on a number of factors, the first and main one being whether I acted as a reasonable man would do in the circumstances. I agree with the findings of fact of Devlin J., and upon those findings I am of opinion that he was right in entering judgment for the shipowners. The appeal should be dismissed.

HODSON L.J. The owners of the S.S. *Stork* claimed damages for breach of contract contained in a charterparty made between them and the charterers dated October 17, 1951. The *Stork* is a vessel of about 7,000 tons gross register and 441 feet in length, and was directed to load a cargo of wood at a place called

Tommy's Arm on the east coast of Newfoundland, for carriage to Rochester. She was an exceptionally large ship to be directed to load at Tommy's Arm, the usual length being about 300 feet. While there she suffered damage, which the shipowners attributed to the unsafe condition of the loading place or berth to which she had been directed. Their case was that by reason of her length there was insufficient room to moor the ship in the place to which she was directed in the conditions of weather to be expected in October and November, when gales are to be anticipated, unless a tug were in continuous attendance. [His Lordship referred to the facts and various calculations as to the dimensions of the berth and the possibility of putting out more cable and continued:]

I agree with the judge—who on this point had the advice of the Elder Brother of Trinity House—that nice calculations of this sort cannot be made in fact, and that standing on the bridge and deciding where to drop anchor you cannot pin-point it. The pilot said that he got as near to the boom as he could, and the master said that he got very close to the boom. Although I accept that the master could not pass his responsibility to the pilot, it was reasonable to seek his advice to show where the anchor was to be dropped. I agree, therefore, with the judge's conclusion of fact, which was to the effect that there was not room for any more chain to be paid out in order to moor the ship in safety. I think that this conclusion can be sustained, notwithstanding that on a nice calculation it can be shown that if the ship went near enough to the boom it appears that over 100 feet more was available to her which, as Mr. Carpmael emphasized, was the case the charterers came to meet.

If the master dropped his anchor at the point where he was advised to do so, as near the boom as he could reasonably get, and then went astern into the loading place to which he was directed, I think that the room which he had was dictated by the position of his anchors and the place at which the ship was moored, and that the shipowners have established that the room was insufficient for safety, and accordingly that the berth was unsafe.

The conclusion of the trial judge, depending as it did in part upon the advice of the Elder Brother given to, and accepted by, the judge, would, I think, be difficult to reverse in this court, which has not had the benefit of such advice.

I come now to the questions of law. The charterers contend that the charterparty contained no warranty of safety, express or

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implied, and that if the loading place was unsafe the master went there of his own choice, and the shipowners cannot recover for the damage to the ship. Clause 1 of the charterparty provided that the ship should " proceed to not more than two approved " loading places as ordered in Newfoundland on the east coast or " so near thereunto as she may safely get, and there load, always " afloat, or safe aground where customary for vessels of similar " size and draft, from the agents of the said charterers, not " exceeding what she can reasonably stow and carry over and " above her tackle, apparel, provisions and furniture, a full and " complete cargo of pulpwood maximum 4 feet lengths (inclusive " of a deck load at full freight but at charterers' risk). Charterers " have the right to order the ship to load at two safe berths or " loading places or one safe berth or loading place combined with " one safe anchorage in the same loading place without extra " freight."

It is argued that the words " approved loading place " say nothing of " safety," and that they apply to Tommy's Arm, to which the ship was directed, and, as I understand it, to berth C; also, if it be held that the ship was ordered to berth C, that the second sentence, which gives the right to order the ship to load at two safe berths, etc., does not come into operation, because the right was never exercised to send her to a second loading place.

This argument leads to an absurd result, since it involves that the first loading place may be unsafe, whereas the second will be safe. I think that berth C in Tommy's Arm was the loading place to which the ship was directed under the first sentence, and that the option given in the second sentence never came into operation, for the two sentences together do not contemplate more than two loading places in all. To put it another way, both sentences are dealing with the same matter, that is, safe loading places. I have no difficulty in coming to the same conclusion as the judge that, construing the two sentences together in which the word " safe " so often appears, the word " approved " takes for granted that the loading places will be safe. It is a necessary implication that they will be safe. I have taken the word " approved " in the sense of generally acceptable in the trade, as the charterers submit, and not in the sense contended for by the shipowners " ought to be approved."

Our attention was drawn to two authorities, *Scott* (*Donald H.*)

& Co. v. *Barclays Bank Ld.*[15] and *Hodgson* v. *Davies.*[16] In the latter case Lord Ellenborough said that an approved bill meant a bill which ought to have been approved, and in the former case Atkin L.J. said that "an approved assurance policy meant a "policy to which no reasonable objection could be made by "reasonable commercial men." Those cases dealt with the form of documents, and I think the sense in which the word "approved," used in connexion with a place in the context of the charterparty, need not be the same, since different considerations apply. I have taken into account the words "or as near thereunto as she may safely get," which follow the first reference to loading places, which it is said point at least to the possibility of the loading place itself being unsafe. I do not accept this contention, since I think those words are apt to cover circumstances in which a ship is hindered from reaching her destination, and do not imply that the destination may itself be unsafe.

The charterers contend that if they had a right to send the ship only to a safe loading place or berth, nevertheless, if the loading place or berth turned out to be unsafe, this was not a breach of contract, but only the failure of a condition precedent, giving the shipowners the right to refuse to perform the contract, and that it has no other consequence. In the alternative they contend, following the decision of the majority of the High Court of Australia in *Reardon Smith Line Ld.* v. *Australian Wheat Board,*[17] that even if their failure to nominate a safe loading place or berth is a breach of contract, there is no remedy for the shipowner except to refuse to proceed to the loading place or the berth, and treat the charterer as in default in providing a cargo in accordance with the conditions of the contract. On this view, if the ship proceeds to the unsafe loading place or berth, there is no breach; the shipowner has waived fulfilment of the condition precedent, that is all, and having chosen to load the cargo, he cannot complain that it was supplied at a place where he need not have taken it. The charterers on this argument drew a distinction between a voyage charter, such as the one now under discussion, and a time charter, where the employment of a ship is placed under the direction of the charterer, and there is usually a provision requiring the latter to indemnify the shipowner for loss or damage occasioned by the master's compliance with the charterer's orders.

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[15] [1923] 2 K.B. 1; 39 T.L.R. 198.

[16] (1810) 2 Camp. 530.

[17] [1954] 2 Lloyd's Rep. 148.

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I do not propose to attempt the task of reviewing the authorities on these topics. This task has been performed by Devlin J. in the present case, and in a previous decision of his in *G. W. Grace & Co. Ld.* v. *General Steam Navigation Ld.*,[18] and by Dixon C.J. in the *Reardon Smith Line* case[19] in a judgment which I find entirely convincing.

Where there has been a breach of safe port or analogous provisions in a charterparty, whether voyage or time, and damage to the ship flows therefrom; in my judgment, the authorities support the view that the shipowner is entitled to recover, apart altogether from an indemnity clause. I do not think that this right is confined to cases where the master has no opportunity of avoiding the damage: see *Limerick Steamship Co. Ld.* v. *W. H. Stott & Co. Ld.*,[20] or where expense is incurred in order to avoid unsafe conditions; *Hall Brothers Steamship Co. Ld.* v. *R. & W. Paul Ld.*[21] and *Axel Brostrom & Son* v. *Louis Dreyfus & Co.*,[22] as was suggested in argument in *G. W. Grace & Co. Ld.* v. *General Steam Navigation Co. Ld.*[23]

Nor do I think that in construing a charterparty a different construction should be given to the words "safe port" and the words "safe berth" on the ground that the finding of a safe berth is a matter of which the charterer is not to be expected to have knowledge and is a special responsibility of the master of the ship; whereas in the case of a safe port the charterer may be expected to have better knowledge than the shipowner. This distinction seems to me to involve a strained and artificial rule of construction. Accordingly I am unable to accept the dictum of Branson J. cited by Dixon C.J., and more fully in the majority judgment of Webb and Taylor JJ. in the *Reardon Smith Line* case,[24] which tends to support this distinction. I agree, therefore, with Devlin J. that the failure to direct the *Stork* to a safe berth is a breach of charterparty in the nature of a breach of warranty entitling the shipowners to such damages as flow from the breach.

The only remaining question is whether the damages flow from the breach in accordance with the ordinary law of damages for breach of contract. Were they the natural and probable consequences of the breach? If not, they are too remote. No question of the application of the doctrine of volenti non fit injuria arises, in my opinion. The question is one of causation. If the master, by acting as he did, either caused the damage by acting unreasonably in the circumstances in which he was placed, or failed to mitigate the damage, the charterers would be relieved, accordingly, from the liability which would otherwise have fallen upon them.

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[18] [1950] 2 K.B. 383.

[19] [1954] 2 Lloyd's Rep. 148.

[20] [1921] 1 K.B. 568.

[21] 30 T.L.R. 598; 19 Com.Cas. 384.

[22] 38 Com.Cas. 79.

[23] [1950] 2 K.B. 383.

[24] [1954] 2 Lloyd's Rep. 148.

The case is put most strongly against the charterers by the master in his letter of October 26 in which he shows that he recognized the danger of the berth where his ship lay, and is reinforced by the fact that the master had entered Tommy's Arm with his ship on the preceding day and had an opportunity of seeing for himself the area of the anchorage and its condition generally. The master did, however, allow his fears to be overridden and deferred to the advice and assurances of those with local experience, in particular to the pilot who had brought his ship in. He was, I think, in a predicament, having the choice between declining the adventure on the one hand, and possible damage to the ship on the other. In acting as he did, obeying the order of the charterers, he was, in my opinion, acting reasonably in the circumstances and not in such a way as to destroy the chain of causation between the breach of contract committed by the charterers and the damage sustained by his ship.

A further point was taken that the shipowners were estopped from claiming damages for the injury to their ship as follows: When they sent the ship into the berth they represented to the charterers, through their master who knew all the facts, that they accepted the berth as a good nomination, and the charterers acted to their detriment by starting to provide the cargo there. In my opinion, there is here no evidence of any representation of an existing fact which could provide the foundation for any argument based on estoppel. I agree that the appeal should be dismissed.

Morris L.J. For a determination of the issues which are raised in this litigation it becomes necessary to construe the contract which was entered into, the wording of which was largely based on a printed form of voyage charter prepared and used by the charterers. Much debate has arisen as to the meaning of the contract. In its printed prepared form the pulpwood charter designates a voyage to Ridham Dock, River Swale, Kent. But each of the ships which in this case the owners might have nominated was too large to be accommodated in Ridham Dock. The pulpwood was, accordingly, to be carried to Rochester.

Owing to conditions existing in October, 1951, ships which did not exceed the size appropriate for Ridham Dock were very difficult to secure. The charter was entered into on October 17, 1951, and nomination by the owners of either the *Stork* or the *Eagle* was to be made by October 19. The contract recorded that the ship was trading, but that it was expected that she would be ready to load about October 22, 23 or 24. The place to which the ship was to proceed in order to load was not stated in the contract. There was no agreement to proceed to some named port or berth the features of which might have been known to, or ascertained by, the shipowners before the agreement was made. The ship was to proceed to "not more than two "approved loading places as ordered in Newfoundland on the "East Coast." The words "as ordered" must mean as ordered by the charterers. The charterers do not state that they will order. But there must be an implication that they will. The owners could not perform their part, nor could they earn their freight, unless at least one "approved loading place" was named. It is not in terms stated in the clause in the contract where "loading places" are first mentioned that they are to be safe loading places. If, however, there is an implied obligation, as in my judgment there is, to name a loading place, it would seem strange if that obligation could be fulfilled by naming an unsafe loading place.

There is no definition in the contract of a loading place. Though in clause 1 that expression is employed and the word "port" does not appear, it is provided by clause 2 that the master or owners are to telegraph the shippers of the cargo (Bowaters Newfoundland Pulp and Paper Mills, Cornerbrook) stating the name of the ship, and also stating the name of the charterers (which would seem in this case to be an unnecessary requirement) and giving notice of the probable date of the ship's arrival "at the loading port or ports." The expression "port" is defined to include "loading place."

The obligation of the ship as laid down in clause 1 is to "proceed to not more than two approved loading places as ordered "in Newfoundland on the east coast, or so near thereunto as she "may safely get, and there load, always afloat, or safe aground "where customary for vessels of similar size and draft, from the "agents of the . . . charterers. . . ." The wording of the first part of clause 1 of the contract to which I have just referred seems to give some prominence and emphasis to the feature of safety.

It is said that the next sentence in clause 1 merely gives the charterers an option or right which in regard to the *Stork* was not exercised. The sentence reads: "Charterers have the right "to order the ship to load at two safe berths or loading places "or one safe berth or loading place combined with one safe "anchorage in the same loading place without extra freight." It is said, therefore, that this sentence should not in the present case be considered. If that sentence be not regarded, the phrase "loading place" would have to be interpreted to denote the precise place where the ship was to load. I do not read the word "approved" as requiring the agreement of the parties. An "approved loading place" denotes a recognized loading place or a place where it has been usual for other ships to load. The presence of the word "customary" in the phrase "where "customary for vessels of similar size and draft" lends support to this view. Even if the sentence which I have quoted above is not brought into play there is, I think, strong support for the view that the necessary implication of a term that the charterers *will*, in fact, order the ship to go to at least one place where the ship can load must include also a term to the effect that the place named for loading must be safe.

Authority is, perhaps, hardly needed in support of the view that the implication of a term is necessary. Reference can, however, be made to two decisions. In *Woolley* v. *Reddelien*[25] it was held that a charterparty by which it was agreed that a ship, after delivering her outward cargo at Malta, should with all convenient speed sail to one of several ports as should be ordered at Malta, contained an implied promise on the part of the charterer that the ship should be ordered at Malta to sail to such port within a reasonable time after her arrival at Malta. In his judgment Tindal C.J. said that that was "the good reason of "the thing." Much to the same effect was the view expressed by Blackburn J. in *Ogden* v. *Graham*,[26] when he said[27]: "By "the charterparty it is agreed that the vessel shall sail for a safe "port in Chili, with leave to call at Valparaiso, and although it "is not in terms so stated, it follows by necessary implication "that the charterers are to name a safe port to the shipowner, "who will then be able to earn his freight by proceeding thither."

I consider, however, that in construing clause 1 it would not be correct to exclude consideration of the sentence which I have quoted. It is not stipulated when the rights or options are to be

[25] (1843) 5 M. & G. 316.
[26] (1861) 1 B. & S. 773.
[27] Ibid. 780.

exercised. I do not think that there was any reason why the charterers should not, after the *Stork* had been some time at berth C, have directed her to either berth A or berth B. It is not necessary to express any final view as to this, since, in my judgment, the presence of the sentence in the clause cannot be ignored when the nature of the term which it is necessary to imply is being considered. In the sentence quoted, the phrase "loading place" seems to me to be used with two different meanings. It is first used as being synonymous with a "safe "berth." It is also used as being the area within which there may be safe berths or loading places, or safe anchorages. In reference to the present case the "loading place," when the phrase is used in one sense, may be Tommy's Arm, and when the phrase is used in another sense the "loading place" may be a safe berth or a safe anchorage within Tommy's Arm. The emphasis on "safety" in the quoted sentence is very strong.

The conclusion I have reached is that there must be an implied term that the charterers will give an order that the ship will proceed to at least one approved or recognized loading place; that if only the start of clause 1 be regarded there is a further implied term that the approved or recognized loading place which is nominated will be safe; but that if, as I think is correct, the whole of the wording of clause 1 should be regarded, the result is that there is an implied term in the contract that the charterers will in fact order or direct the ship to the place where she would find the cargo to be loaded, together with an express or implied term that the place to which the ship would be directed would be safe.

In the present case the ship was first ordered to proceed to Tommy's Arm, and was later ordered to proceed to berth C. One view may be that "berth C in Tommy's Arm" was the approved loading place to which the ship was ordered to go. Another view, which I prefer, is that the ship was first ordered to go to Tommy's Arm—which was the approved "loading place," using that phrase in its wider sense; and that the ship was then ordered to berth C as being the safe berth or loading place, or safe anchorage situate within the approved loading place. On either view the performance of the duty to order the ship to the place to which she was to go involved that berth C in Tommy's Arm should be safe.

The corollary of being in a position to give an order is being in a position to command obedience. When the order was given to the ship to proceed to Tommy's Arm the shipowners were under a contractual duty to obey; likewise when the further order was given to go to berth C there was a contractual duty to go there. If there is a right to order the ship to load at two safe berths, there must be a right to order the ship to load at one safe berth, and a contractual right to order must involve a contractual duty to obey. If it was known that berth C was unsafe, then an unlawful order would have been given which would not command obedience. But if under the terms of a contract there is the duty on the one party to give an order and on the other party to obey it, it would seem strange doctrine if it were laid down that the latter must, before obeying, take elaborate steps to test the validity of an apparently valid order.

It was submitted on behalf of the charterers that if they named a place to which the ship should go, there was no obligation on the ship to proceed thither until such time as those responsible for the ship decided that the place was safe. Alternatively stated, the argument was presented that a nomination by charterers must be either good or bad; that if bad it could be rejected; that if accepted there could not later be complaint made in regard to the place; and that shipowners would be estopped from making any such complaint. I am unable to accept this reasoning, which seems to me to give insufficient weight to the respective obligations undertaken by the parties to the contract. If the reasoning were sound the result would in practice be highly inconvenient to all concerned. Indeed, it might involve that a ship should not obey an order to proceed to a place without sending an advance survey party and receiving a report from them.

In the present case the charterers, in my judgment, promised (either impliedly or expressly, as I have discussed above) that they would order the ship to go to at least one safe berth or anchorage in at least one approved loading place. They would be in breach if they ordered the ship to go to an unsafe berth or anchorage. If the ship suffered damage as a result of going to the designated unsafe berth or anchorage, then her owners would be entitled to damages for breach of contract. If the position could be, or ought to be, stated more narrowly, so that the only obligation was to order the ship to proceed to at least one approved loading place with the right, but not the duty, to give a further order to proceed to a safe berth or anchorage at, or within, the loading place, then, if the right is exercised of ordering the ship to a berth or anchorage, it must be to a safe berth or anchorage.

This does not mean that owners would necessarily be able to recover damages in respect of injury sustained by a ship if it were quite clear that an order had been given to go to an unsafe place. The order would then not be a lawful order, and would be known not to be a lawful order. Though there would have been a breach of contract in giving the order to go to an unsafe place, this would not justify the deliberate act of allowing the ship to suffer damage. The owners must not throw their ship away. If, having the opportunity to refrain from obeying the order, and having the knowledge that the ship had been wrongly directed to run into danger, those responsible for the ship allowed her to be damaged when they could have saved her, it would be contrary to reason if damages could be recovered. They could not be recovered for the reason that they would not be the result of the breach of contract, but of the deliberate and unnecessary act of those in control of the ship. Further. there is a duty to behave with ordinary reasonable prudence so as to minimize damages, and the readily attainable minimum may in some cases be nil. But this does not involve, nor in practice would it be reasonable or convenient, that where charterers have the contractual duty of ordering a ship to go to some place designated safe, and where the ship has the contractual duty of obeying the order, the ship must always doubt the validity of the order and must not proceed until, by making some reconnaisance or by seeking information extending beyond that ordinarily available to a reasonable and prudent ship's master, there has been a satisfactory verification that a place designated safe is in fact so.

My analysis of the terms of this contract leads me, therefore, to the view that the charterers were in breach of contract if berth C of Tommy's Arm was unsafe, and that the owners can recover for the damage which they suffered unless the master of the *Stork* deliberately or voluntarily assumed the risk of sustaining the damage. It was submitted by the charterers that they did not contract not to nominate an unsafe place or berth. With every respect, I find this argument unsound. If my analysis of the contract is correct the charterers made a promise that they would order the ship to go to a safe place. They break that promise if they order the ship to go to an unsafe place. If, because of their breach (and not for any other reason), the ship is damaged, the shipowners should be entitled to recover in respect of the damage sustained.

It was further submitted by the charterers that in nominating a place they merely represented that, in their view, the place was safe, and that, unless they were fraudulent, they would not be liable. But this submission does not prevail if the obligation was to order the ship to go to a safe place; for there is a breach of that obligation if the ship is ordered to go to an unsafe place.

There can, I think, be no question as to the meaning of the word "safe" when used in the contexts now being considered. A place will not be safe unless in the relevant period of time the particular ship can reach it, remain in it, and return from it, without, in the absence of some abnormal occurrence, being exposed to danger. It is a question of fact, having regard to the circumstances of each particular case: see the judgment of Roche J. in *Axel Brostrom & Son* v. *Louis Dreyfus & Co.*[28]

If berth C in Tommy's Arm was unsafe for the *Stork*, then, unless the master of the ship so acted as to defeat a claim, I consider that the shipowners are entitled to recover damages from the charterers. This conclusion is in accord with the decision reached in *Axel Brostrom & Son* v. *Louis Dreyfus & Co.*[28] It is to be noted that in his judgment, when referring to a clause in the charterparty which prescribed a safe port of discharge, Roche J. spoke of the stipulation as to safety as something "which one would think would be implied if it were not "expressed."[29] This accords with the view of Wightman J. in *Ogden* v. *Graham*[30] when he said: "Was such a port safe within "the meaning of the charterparty? Did it come within the terms "of a safe port in Chili? I do not know what force can be given "to the word 'safe' when added to the word 'port.'"

The conclusion I have expressed is also in accord with the decision reached in *Hall Brothers Steamship Co. Ld.* v. *R. & W. Paul Ld.*[31] In that case the vessel was to be given orders to discharge at a safe port and was directed to King's Lynn, which proved not to be a safe port for the vessel; the vessel could not reach King's Lynn without lightening before reaching there, and it was held that the owners could recover the expenses incurred in lightening her. Sankey J. rejected a submission that because the master had accepted the order to proceed to King's Lynn the owners were estopped from asserting that King's Lynn was not a safe port.

Without referring at any length to *Limerick Steamship Co. Ld.* v. *W. H. Stott & Co. Ld.*[32] and *Lensen Steamship Co. Ld.* v. *Anglo-Soviet Steamship Co. Ld.*,[33] I think it can be said that each of these cases proceeded on the basis that it was a breach of the charter to order the ship to go to an unsafe place, and that there could be recovery in respect of consequential damage sustained by the ship. But any assistance derived from considering these and other authorities must be tested by relation to the particular express contractual provisions.

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[28] 38 Com.Cas. 79, 85.
[29] Ibid. 87.
[30] 1 B. & S. 773, 779.
[31] 19 Com.Cas. 384.
[32] [1921] 1 K.B. 568.
[33] 50 Ll.L.R. 62; 52 Ll.L.R. 141.

In *Ogden* v. *Graham*[34] there was no actual injury to the ship. The ship did not proceed to the unsafe port which was named. But damages were recovered (occasioned by the detention of the ship) because, as Wightman J. said: "The charterers "must pay the damage occasioned by the breach of contract in "not naming a safe port," or, as Blackburn J. said: "They "are liable for damages for not naming a safe port within a "reasonable time."

I refer to these words because, in clear and simple terms, they illustrate that a claim for damages for breach of a contract to charter a ship must be approached just as any claim for breach of any other contract, whatever its form or subject-matter may be. There must first be ascertainment as to whether the party sued made a promise and, if so, what were its terms; secondly, a determination as to whether the promise was broken; and, thirdly (if this arises), an ascertainment as to what damage was occasioned by the breach. If the type of contract being considered is a contract chartering a ship, it seems to me that the line of approach must be just the same whether a time charter or a voyage charter is in issue. But though this is a trite observation, everything must depend upon the particular terms of the particular contract which is being construed.

For the reasons which I have given, I find myself in accord with the approach and the conclusion of Devlin J. in regard to the issues of law. It results from the views which I have expressed that unless *West (Samuel) Ld.* v. *Wright's (Colchester) Ld.*[35] is distinguishable, I do not feel able to follow it. I would most respectfully express my appreciation of the line of reasoning of Dixon C.J. in the *Reardon Smith* case.[36]

[His Lordship considered the questions whether berth C was unsafe and whether the master acted reasonably, and concluded:] Though he was uneasy, and though he expressed his anxieties, it is to be noted that the master received reassurance, expressed in picturesque language, from the pilot who possessed intimate local knowledge. It was not imprudent for the master, even while he was unable to suppress his apprehensions, to be guided by what he was told. A consideration of the evidence leads me to the view that, being confronted with a difficult situation, the master did not act unreasonably, and that it ought not to be held that there was any deliberate assumption of risk. In my judgment, the evidence shows that, in breach of contract, the charterers directed the *Stork* to go to berth C in Tommy's Arm, which berth was unsafe for that ship, and that there are no reasons why the owners should not recover in respect of the damage which, as a result, the ship sustained. I would dismiss the appeal.

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[34] 1 B. & S. 773.

[35] 40 Com.Cas. 186.

[36] [1954] 2 Lloyd's Rep. 148.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Lawrence Jones & Co.; Stokes & Mitcalfe.*

A. W. G.

QUELCH *v.* PHIPPS.

1955
Apr. 28.

Lord Goddard C.J., Hilbery and Pearce JJ.

Road Traffic—Accident—Report of accident—"Owing to the presence of "a motor vehicle on a road"—Passenger injured by stepping off moving omnibus—Driver's knowledge—Duty of driver to report to police—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 22.
Causation.

An omnibus slowed down as it approached traffic signals at red but did not stop because the signals changed to green before it was necessary to do so, and a passenger, thinking that the bus was going to stop at the signals, stepped off the platform whilst the bus was moving and fell forward onto the road, receiving slight injuries. The driver of the bus did not know of what had occurred until he reached the next stopping place, when the conductor told him. The driver, not having given the passenger the information mentioned in section 22 of the Road Traffic Act, 1930, and having failed to report the accident to the police within 24 hours, was charged with an offence under that section:—

Held, that since the accident happened through the passenger getting out of a motor-vehicle on the road, it occurred "owing to "the presence of a motor vehicle on a road" and was, therefore, an accident within the meaning of section 22, and that as the driver had knowledge of the accident he was under a duty to report it, and the offence, accordingly, was proved.

Per Lord Goddard C.J. The only thing which we can possibly lay down as a matter of construction is that there must be some direct, not an indirect but a direct, causal connexion between the motor-vehicle and the happening of the accident.

Per Hilbery J. The presence of the motor-vehicle on the road must be something more than a mere sine qua non and there must be some causal connexion between the accident and the presence of the motor-vehicle on the road.

CASE STATED by Oxford City justices.

An information was preferred by a superintendent of police against the defendant, Harry Dennis Phipps, that he at about 7.20 p.m. on November 14, 1954, in the City of Oxford, being then the driver of a certain motor-vehicle, namely, an omnibus, and an accident having then occurred whereby injury was caused to a certain person owing to the presence of the motor-vehicle on the road, and not having given his name and address to any person having reasonable grounds for so requiring, did not report the accident at a police station or to a police constable within 24 hours of the occurrence, contrary to section 22 of the Road Traffic Act, 1930.[1]

The following facts were found by the justices: At about 7.20 p.m. on November 14, 1954, the defendant was driving a motor-vehicle, namely, an omnibus, in High Street in the City of Oxford. The bus slowed down as it approached the junction of High Street and Longwall Street, because the traffic signals at the junction were at red, but it did not stop at the traffic signals because they changed to green before it was necessary to stop. While the bus was proceeding across the junction a passenger, notwithstanding warnings by the conductor, stepped off the platform and fell forward onto the road, injuring his right knee and sustaining a bruise and a cut over his right eye. The bus stopped at an authorized stopping place about 60 yards beyond the traffic lights, and the conductor there informed the defendant of the accident and told him that the passenger had sustained a cut over one eye. The conductor then walked back to the scene of the accident and took the passenger home, but did not give him his own or the defendant's name or the number of the bus. The defendant did

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[1] Road Traffic Act, 1930, s. 22: "(1) If in any case, owing to the "presence of a motor vehicle on a "road, an accident occurs whereby "damage or injury is caused to any "person, vehicle or animal, the driver "of the motor vehicle shall stop and, "if required so to do by any person "having reasonable grounds for so re-"quiring, give his name and address, "and also the name and address "of the owner and the identification "marks of the vehicle. (2) If in the "case of any such accident as afore-"said the driver of the motor vehicle "for any reason does not give his name "and address to any such person as "aforesaid, he shall report the acci-"dent at a police station or to a police "constable as soon as reasonably "practicable, and in any case within "twenty-four hours of the occurrence "thereof."

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not see or speak to the passenger at or immediately after the time of the accident and did not know that an accident had occurred until told about it by the conductor at the stopping place. On the morning of November 16, 1954, the conductor reported the accident at the Oxford City police station. The defendant failed to report the accident at a police station or to a police constable within 24 hours of the occurrence.

It was contended on behalf of the prosecutor that the defendant was a driver for the purposes of section 22 of the Road Traffic Act, 1930; that he knew that an accident had occurred in which a person had been injured; and that in the circumstances it was his duty under subsection (2) to report the accident which was attributable to the presence of the vehicle on the road since he had failed to comply with subsection (1).

It was contended on behalf of the defendant that the accident occurred as a result of the passenger alighting, despite the conductor's warnings not to do so, and not owing to the presence of a motor-vehicle on the road; and that such an accident was not an accident which a driver was under a duty to report under the section. The fact that the defendant had no personal knowledge of it at all until told of it by the conductor at the next stop was also relied upon.

The justices were of the opinion that, whilst in the ordinary meaning of the word the occurrence was undoubtedly an accident and also in the widest possible sense of the words it could be contended that it was owing to the presence of the motor-vehicle on the road, it was not an accident within the meaning of the section. They were of the opinion that "accident" within the meaning of the section was an accident involving some kind of collision, whether between two vehicles or between a vehicle and a person or animal, and that this occurrence was in essence no different from the case of a would-be passenger who might run after a motor-omnibus in a futile attempt to board it whilst on the move and who in the process fell down and injured himself in the road. They were further of the opinion that as the section was a penal one it must be construed strictly and that any doubt must be resolved in favour of the defendant; and having come to that conclusion they did not apply their minds to the question whether or not the defendant had sufficient knowledge of the occurrence in the light of the decision in *Harding* v. *Price*,[2] but dismissed the information.

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[2] [1948] 1 K.B. 695; 64 T.L.R. 111; [1948] 1 All E.R. 283.

The prosecutor appealed.

Frank Whitworth for the prosecutor. The justices were wrong in reading the word "accident" in section 22 of the Act of 1930 in a narrow sense as meaning "collision." The question to be asked under the section is whether the accident could have occurred without the motor-vehicle being there. If the accident in *Jones* v. *Prothero*,[3] which was caused by the opening of the door of a stationary car, was "owing to the presence of a motor-"vehicle on a road," so, on the same principle, was the accident in the present case. The purpose of the section is to protect the person injured so that, if he subsequently decides to institute civil proceedings, he may know whom to sue. This is the very type of case which the section was designed to meet, and there was a duty on the defendant to report the accident. The report made by the conductor was too late. [Reference was also made to *Harding* v. *Price*.[4]]

M. R. Nicholas for the defendant. *Jones* v. *Prothero* [5] does not assist because the question in that case was whether the defendant was the driver, not as to the meaning of the words "owing to the presence of a motor vehicle on a road." Some limitation must be put upon those words, otherwise absurd results would follow: for example, the driver would be under a duty to report an accident if a passenger bumped his head on the cross-bar, or if a thief, trying to open a car to take out a suitcase, cut his hand. [Reference was also made to *Harding* v. *Price*.[6]]

LORD GODDARD C.J. This is a case stated by justices for the City of Oxford, whose decision I can quite understand and would agree with if I felt it possible to do so, but I am afraid that I do not.

The charge is based on section 22 of the Road Traffic Act, 1930. [His Lordship read section 22 and continued:] A bus was proceeding down the High Street at Oxford and as it got to the well-known junction with Longwall Street just by Magdalen College and began to slow up for the lights, the lights changed to green. The bus stop is just the other side of the junction by Magdalen College, but a passenger who was waiting to get off the bus thought that he would be able to get off because it would stop at the lights. Although it did not stop at the lights, but went on to its stopping place, the passenger jumped off the bus and fell and hurt himself, apparently not badly. The defendant, the bus driver, did not think that that was a matter which he had to report. He was told about it as soon as he reached the stop; the conductor went back and spoke to the man and reported the accident to the police station, unfortunately a few hours too late.

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[3] [1952] 1 All E.R. 434.

[4] [1948] 1 K.B. 695.

[5] [1952] 1 All E.R. 434.

[6] [1948] 1 K.B. 695.

We are told that this is a matter of importance. I do not know whether it is or is not, but we have to see whether or not this sort of accident comes within the words of the section. If it does, an offence has been committed, but of course the justices can, and I have no doubt would, in a case of this kind, grant an absolute discharge. The section states: "If in any case, owing "to the presence of a motor vehicle on a road, an accident "occurs" and I think that the only thing which we can possibly lay down as a matter of construction is that there must be some direct, not an indirect, but a direct causal connexion between the motor-vehicle and the happening of the accident. It would not be enough, I think, to take the trenchant illustration given by Pearce J., if a person about to cross a road sees a motor-car, changes his mind and steps back instead of going on, and happens to knock down a pedestrian, for that would be nothing to do with the driver of the motor-car. In the present case the accident happened owing to the passenger getting off the bus. He got off the bus while it was in motion, and although no one suggests that the bus driver was in any way to blame or that the passenger has any cause of action against the owners of the omnibus, I think that it is impossible to say that the accident did not occur owing to the presence of a motor-vehicle on the road.

I think, therefore, that the case must go back to the justices with an intimation that the offence was proved; and to prevent any further discussion on the matter or the possibility of a further case, it seems to me clear that the doctrine which we laid down in *Harding* v. *Price* [1] does not apply. In that case we said that if a person genuinely did not know that an accident had happened because it occurred behind the driver or behind the car, the section did not apply. The driver must, at any rate from a common-sense point of view, know that the accident occurred, and in most cases he would know. In this case the driver knew of the accident immediately after it had happened because his conductor told him. Therefore, I think that there was a duty to report.

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[1] [1948] 1 K.B. 695; 64 T.L.R. 111; [1948] 1 All E.R. 283.

Whether Parliament envisaged such a case as this is another matter, but I do not think that we can limit the words in the way in which the justices have done. With some regret we allow this appeal, but the justices will no doubt see their way to give an absolute discharge.

HILBERY J. I, too, think that it is impossible for us to limit the words in the way in which the justices sought to limit them. The words of the Act are: "If in any case, owing to the presence "of a motor vehicle on a road, an accident occurs", then the driver shall report it, in the circumstances of this case, within 24 hours. The justices sought to limit the words "owing to "the presence of a motor vehicle on a road" to an accident involving some kind of collision whether between two vehicles or between a vehicle and a person or animal. There is no real ground for putting that limit upon the words. The limit, if it be limit, which I should have thought must be put upon the words is only this, that they indicate that the presence of the motor-vehicle on the road must be something more than a mere sine qua non, and that there must be a causal connexion between the accident and the presence of the motor-vehicle on the road.

For those reasons I agree with the judgment proposed by my Lord.

PEARCE J. I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for H. J. A. Astley, Oxford; Pattinson & Brewer.*

J. F. L.

C. A.

1955
Apr. 26.

Singleton, Jenkins and Morris L.JJ.

REILLY *v.* ORANGE.

[Plaint No. K. 260.]

Easement—Prescription—Period of user until action—No possibility of interruption for a year—Right of way—Contiguous plots of land —Agreement—Grant of conditional user by defendant of plaintiff's entrance drive—Action by plaintiff to terminate user—User for period of over 19 *years—Prescription Act,* 1832 (2 *&* 3 *Will.* 4, *c.* 71), *ss.* 2, 4.

The plaintiff and the defendant in October, 1932, and June, 1933, respectively, became by conveyance the owners of contiguous plots of land, and in September, 1934, the plaintiff granted to the defendant permission to use for domestic purposes an entrance to his own land by way of the plaintiff's drive. The defendant continued to use the drive without interruption for upwards of 19 years until December, 1953, when the plaintiff withdrew the permission and on July 1, 1954, commenced proceedings in the county court to determine the use. The defendant counterclaimed (in December, 1954) for a declaration that he was entitled to a right of way in the nature of an easement by prescription over the plaintiff's land. The county court judge dismissed the counterclaim and gave judgment for the plaintiff. On appeal:—

Held that, since to establish an easement under the Prescription Act, 1832,[1] a claimant must by section 2 show that he has enjoyed a user for the full period of 20 years without interruption, and by section 4 such period is to be deemed to be the period next before the commencement of "some suit or action wherein the claim or "matter to which such period may relate shall have been or shall "be brought into question," the defendant's claim to an easement failed, although at the commencement of the action (on July 1, 1954) there could no longer be an interruption acquiesced in for one year before the completion of the full 20 years.

Flight v. *Thomas* (1841) 8 Cl. & Fin. 231 distinguished.

APPEAL from Deputy Judge Coplestone-Boughey, sitting at Birkenhead County Court.

The plaintiff, Ernest Reilly, and the defendant, John Orange, in October, 1932, and June, 1933, respectively, became by conveyance the owners of contiguous plots of land on the west side of Thurstaston Road, Thurstaston, Chester. The two plots, of which the northern one was the plaintiff's, had formerly been in the common ownership of one person, and the only building erected on either of them was a commercial garage situate on the

[1] Prescription Act, 1832, s. 2: ". . . That no claim which may be "lawfully made at the common law, "by custom, prescription, or grant, to "any way or other easement, . . . "when such way or other matter as "herein last before mentioned shall "have been actually enjoyed by any "person claiming right thereto with-"out interruption for the full period "of twenty years, shall be defeated "or destroyed by showing only that "such way or other matter was first "enjoyed at any time prior to such "period of twenty years, but never-"theless such claim may be defeated "in any other way by which the same "is now liable to be defeated."

S. 4: ". . . That each of the "respective periods of years herein-"before mentioned shall be deemed "and taken to be the period next "before some suit or action wherein "the claim or matter to which such "period may relate shall have been "or shall be brought into question, "and that no act or other matter "shall be deemed to be an interrup-"tion, within the meaning of this "statute, unless the same shall have "been or shall be submitted to or "acquiesced in for one year after the "party interrupted shall have had or "shall have notice thereof, and of the "person making or authorizing the "same to be made."

plaintiff's plot. The conveyances had apparently been drawn, and the plans upon them prepared, without the precaution of first viewing the property. In the result the conveyances were effected on the footing that the plots were two rectangular plots and provision was made for access from Thurstaston Road to the western parts of the two plots by showing on the plans a central strip, running from east to west, of 9 ft. in width, 4 ft. 6 ins. of which width was to be contributed by each plot. The conveyances contained appropriate provisions for the use by the two parties of this 9 ft. way as a means of access to and from the more western parts of their plots. The part of the defendant's plot which, according to the conveyances, should have provided the site of the eastern portion of the 9 ft. road, was on a level lower than the plaintiff's property, and on a level lower than Thurstaston Road, and it would have been a quite impracticable proposition to attempt to make up the 9 ft. roadway as contemplated by the conveyances.

In these circumstances in 1934 the parties, being then on friendly terms, agreed to exchange certain parts of their properties, the defendant being granted permission to use a driveway made by the plaintiff on his own land as a means of access to the western part of his (the defendant's) property, and in particular to a bungalow and garage which he had erected on his plot. In 1940 the plaintiff sold the Heatherland Garage and the eastern portion of his property, but he retained the strip of land which was the site of the means of access above referred to. Subsequently the parties fell out, the plaintiff complaining that the defendant was using the drive for the purposes of his business, whereas the agreement, the plaintiff asserted, only provided for access for domestic purposes. In December, 1953, the plaintiff by his solicitors gave notice to the defendant determining any right of the defendant to use the way over the plaintiff's property; and on July 1, 1954, by proceedings in the county court he claimed a declaration that the defendant's right to use the drive had been determined, an injunction to restrain the defendant by himself, his servants or agents from using the drive, and damages for trespass. The defendant counterclaimed on December 1, 1954, for a declaration that he was entitled to a right of way over the plaintiff's land. His case was that as part of the agreement of 1934 he was to have in perpetuity a right of way for all purposes over the plaintiff's land, in the nature of an easement annexed to his (the defendant's) plot.

The deputy judge gave judgment for the plaintiff and dismissed the counterclaim. He accepted the plaintiff's evidence that under the agreement the user by the defendant of the drive was only to continue until the defendant had created a new means of access on his own land, which he had in fact done at the end of 1953.

The defendant appealed.

W. Lyon Blease for the defendant. At the trial of the action the defendant claimed to be entitled to an easement in fee simple —a contract of right in perpetuity. The judge found against him on that, and now the defendant's only case can be that having used the drive on the plaintiff's land without interruption for a period of 20 years he has acquired an easement by prescription. To establish a claim in prescription or at common law the use of the land must be open and continuous and must not be by permission of the servient owner. If the servient owner from time to time gives permission for the use a perpetual right of way cannot be established. There was no undertaking by the defendant to construct a drive on his own land and the plaintiff never did anything under the agreement which would amount to a renewal of the original permission. One single act of permission followed by 20 years of use creates a right under the Prescription Act, 1832. Under section 4 of that Act no interruption of the enjoyment is to count unless it is submitted to or acquiesced in for one year after the party interrupted shall have had notice thereof. If, therefore, a defendant has had the use of the land for 19 years and one day there cannot be an interruption for one year, but the right of easement cannot be claimed until the period of 20 years has elapsed. It is well established that no physical interruption of the enjoyment for less than one year can prevent the right from maturing: *Flight* v. *Thomas.*[2]

[JENKINS L.J. It appears to me that under the Act the defendant must show that he has enjoyed the right for 20 years before the writ in the action is issued.]

It is submitted that the issue of the writ was not a denial of the right by prescription. The claim to a right by prescription was not raised until the counterclaim on December 1, 1954. By the writ the plaintiff claimed that the defendant was a mere licensee. Permission to use in general terms, followed by 20 years of user, does not prevent the acquisition of an easement:

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[2] (1841) 8 Cl. & Fin. 231.

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see *Kinloch* v. *Nevile* [3]; *Tickle* v. *Brown.* [4] [*Cooke* v. *Ingram* [5] was also referred to.]

K. Graham Routledge for the plaintiff. To establish an easement the use of the land must have been for the full period of 20 years immediately prior to the commencement of the action. The period cannot continue to run after the issue of the writ. The defendant has not shown 20 years' uninterrupted enjoyment and the plaintiff is entitled to judgment. The defendant was a mere licensee and was only given permission to use the plaintiff's drive until such time as he could construct an entrance on his own land, and he has done so. [*Battersea (Lord)* v. *London City Sewers Commissioners* [6]; *Ward* v. *Robins* [7]; *Wright* v. *Williams* [8]; *Richards* v. *Fry,* [9] and *Hyman* v. *Van den Bergh* [10] were referred to.]

SINGLETON L.J. I will ask Jenkins L.J. to deliver the first judgment.

JENKINS L.J. stated the facts and continued: The matter came before Deputy Judge Coplestone-Boughey at Birkenhead. He gave judgment in favour of the plaintiff and dismissed the defendant's counterclaim. He made a declaration that the defendant's right to use the plaintiff's drive had terminated, and he awarded the plaintiff £12 damages for the various acts of trespass and so forth complained of. In the reasons for his judgment, the deputy judge said: "The only conflict of fact is "about the agreement. I am satisfied that both parties are doing "their best to recollect what was agreed." With that preface he said that he preferred the plaintiff's evidence to that of the defendant. His finding, based on the plaintiff's evidence, was that the plaintiff granted the defendant permission to use the drive for access to his premises for domestic purposes, but only until such time as the defendant should construct a separate means of access to his premises over his own land. The defendant's evidence had been to the effect that as part of the agreement of 1934 he (the defendant) was to have in perpetuity a right of way for all purposes over the plaintiff's land, in the nature of an easement annexed to the defendant's plot.

Mr. Blease, for the defendant, very properly admits that for the purpose of this appeal he must accept the deputy judge's finding as to the nature and terms of the agreement, but he says that notwithstanding this he is entitled to succeed. He says that on two grounds: (1) that he has had 20 years' uninterrupted enjoyment of the right claimed, as required by the Prescription Act, 1832; (2) that although the right he claims had its origin in the agreement of 1934, and although that agreement, as found by the deputy judge, would only give him a right to use the drive for domestic purposes, and only until such time as he made a drive of his own, that permission did not prevent the 20 years' user on which he relies from establishing his right under the Prescription Act, 1832. The second of those points can only arise if Mr. Blease is entitled to succeed on the first.

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[3] (1840) 6 M. & W. 795.
[4] (1836) 4 Ad. & El. 369.
[5] (1893) 68 L.T. 671.
[6] [1895] 2 Ch. 708.
[7] (1846) 15 M. & W. 237.
[8] (1836) 1 M. & W. 77.
[9] (1838) 7 Ad. & El. 698.
[10] [1908] 1 Ch. 167.

The evidence as to the date of the agreement under which the defendant used the drive seems to have been somewhat indefinite. The defendant appears to have thought that the agreement was made in September, 1934. The plaintiff could give no nearer date than that it was in May, June or July. The action was commenced, taking the date of the particulars of claim as the date of commencement, on July 1, 1954. So, on the evidence, the defendant failed to prove 20 years' user down to the date of the commencement of the action, because to do that it was necessary for him to prove that the agreement was made not later than July 1, 1934. But Mr. Blease seeks to surmount that difficulty by an argument on the Prescription Act, 1832, which makes it necessary to refer to the two sections of that Act which are material for the present purpose. [His Lordship read sections 2 and 4 of the Act and continued:]

Mr. Blease's argument on this part of the case is of this nature: he says that what must be shown is 20 years' uninterrupted user, and that, according to section 4, no act or matter counts as an interruption unless the same shall have been or shall be submitted to or acquiesced in for one year. It follows, says Mr. Blease, that inasmuch as in this case over 19 years' user down to the commencement of the action is proved, the defendant's right is made good inasmuch as there could be no interruption acquiesced in for one year between the date of the commencement of the action and the completion of the full period of 20 years.

In support of that proposition he referred us to the well-known case of *Flight* v. *Thomas*.[1] In that case: "A. had the free

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[1] (1841) 8 Cl. & Fin. 231.

"access of light and air through a window of his house for nineteen "years and 330 days, and B. then raised a wall which obstructed "the light, and the obstruction was submitted to only for 35 days, "when A. brought an action to remove it." It was held: "that "the right of action was complete; that the twenty years' enjoyment was to be reckoned from the commencement of the "enjoyment to the time of bringing the action; and that an "interruption of the enjoyment, in whatever period of the twenty "years it may happen, cannot be deemed an interruption within "the meaning of the Act, unless it is acquiesced in for a whole "year."

Mr. Blease seeks to apply that to the present case in this way: he says that the commencement of the action constituted an interruption, and that, inasmuch as the action was not commenced until after the alleged easement had been enjoyed for more than 19 years, the interruption so constituted could not last for the required period of one year, so that his title was complete at the time of action brought. In my view that argument cannot prevail. What the Prescription Act requires, as appears from the combined effect of section 2 and section 4, is the full period of 20 years, being "the period next before "some suit or action wherein the claim or matter to which such "period may relate shall have been or shall be brought into "question." The commencement of the suit or action in my view is clearly not an interruption within the meaning of section 4, but is the event marking the date down to which the requisite period of user must be shown. What must be shown is a full 20 years reckoned down to the date of action brought. That must be an uninterrupted period, but in considering whether it is an uninterrupted period or not, interruptions not acquiesced in for at least a year are not to be counted as interruptions.

Accordingly, in my view Mr. Blease's first argument must fail, unless it can be said that the present action was not a suit or action wherein the claim or matter to which the period relates has been brought into question. Mr. Blease suggested that the present action was not such a suit or action. I cannot agree. Substantially the whole subject-matter of the action, as set out in the particulars of claim, concerned the use by the defendant of the plaintiff's drive and the question whether the defendant was entitled to continue the use of it or not. In my view, therefore, this was a suit or action wherein the claim or matter to which the relevant period related was brought into question; and it follows, to my mind, that inasmuch as that action was commenced before the full period of 20 years' user had been completed, the defendant's claim based on prescription must fail.

The view I have formed on that first point makes it unnecessary for me to express any view on the second point, that is to say, Mr. Blease's submission to the effect that if 20 years' user could be made out the fact that such user was referable in its origin to the agreement of 1934 would not prevent it from establishing a prescriptive right. That, on the authorities (and Mr. Blease referred us to some of them) seems to me to be a matter of some difficulty. Mr. Blease has pointed to various observations which appear to afford some support for his view, but on the other hand it would, to my mind, be surprising if in a case such as this a matter which was intended to be a purely personal arrangement of a temporary character between two neighbours as, for example, an arrangement that one can use a way on the other's land until he has a way of his own, should produce, contrary to the intention of either of them, a prescriptive right of way for all time, not merely personal to the party for whose convenience the agreement was made, but, also, enuring for the benefit of anyone for the time being occupying what would then be the dominant tenement.

Be that as it may, the permission given was in fact revoked and the action was brought before the necessary period of 20 years' user had been completed. Accordingly, even if Mr. Blease were right in his submission that an agreement or licence such as this does not affect the running of time, the defendant could not succeed, because the necessary period of user has not been made out. For these reasons I am of opinion that this appeal fails and should be dismissed.

Morris L.J. I agree and do not desire to add to what my Lord has said.

Singleton L.J. I agree.

Appeal dismissed.

Solicitors: *Ranger, Burton & Frost for G. F. Lees & Son, Birkenhead; Kinch & Richardson for Percy Hughes & Roberts, Birkenhead.*

A. W. G.

C. A.

1955
April 21;
May 4.

Singleton, Jenkins and Morris L.JJ.

DEAN *v.* WIESENGRUND.

[Plaint L. No. 67.]

Landlord and Tenant—Rent restriction—Standard rent—Rent in excess paid by tenant—Death of tenant—Right of executor to recover—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 14 (1)—*Law Reform (Miscellaneous Provisions) Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 (1).

Statute—Construction—Expressio unius exclusio alterius.

After the death of the tenant (contractual) of a rent-controlled flat, who had paid to the defendant landlord as rent a sum in excess of the standard rent, her executor claimed to recover that excess rent from the landlord. His action was dismissed by the county court judge on the ground that section 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, while giving the tenant a right to recover the excess rent from the landlord or his legal personal representative, restricted that right to the tenant by whom the excess had been paid, and that, therefore, the right was destroyed by the death of the tenant:—

Held, that section 5 of the Courts (Emergency Powers) Act, 1917, and section 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, conferred on a tenant a right which prima facie would on his death pass to his personal representative unless there was in the statute words which clearly indicated that the right was not so to pass; and that the wording of section 14 (1) was not sufficient to deprive the tenant's estate of an asset given to the tenant by a statute.

Held, further, that, if that were wrong, the cause of action vested in the tenant would survive her death for the benefit of her estate by section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934.

Twomey v. *Cronin* [1937] I.R. 324 and *Minto* v. *Cahill* [1940] I.R. 302 disapproved.

APPEAL from Judge Sir Gerald Hargreaves, sitting at West London County Court.

The plaintiff, Stephen Richard Dean, was the executor of Mrs. Matilda Agnes Bligh, deceased, and claimed to recover from the defendant, the landlord of a ground floor flat at No. 17, Elvaston Place, Kensington, a sum of £140 4s. in respect of rent paid to the defendant by Mrs. Bligh in excess of the standard rent of the flat, and a further sum of £112 15s. overpaid by the plaintiff as executor. The flat was at all times a dwelling-house to which the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, applied.[1] By an agreement dated January 10, 1948, the defendant granted to William Alexander Edwards a tenancy of the flat for a term of seven years from December 25, 1947, at a yearly rent of £300, inclusive of rates, the tenant covenanting to pay as additional rent any increase in the rates then payable. By an agreement in writing dated May 9, 1949, Edwards assigned the remainder of the term of seven years to Mrs. Bligh. From the date of that agreement until her death on January 17, 1954, Mrs. Bligh paid rent to the defendant at the agreed rate. Since her death the plaintiff, as executor, had also paid rent at the agreed rate. The recoverable rent at all times during the two years preceding the date of the commencement of the present action was £175 per annum, and overpayments to the amounts claimed had been made.

The defendant landlord admitted liability to repay the £112 15s. overpaid by the plaintiff, but denied liability to repay the sum of £140 overpaid by Mrs. Bligh, on the ground that the personal right of the tenant died with her and did not pass to her personal representative.

The county court judge found for the defendant, basing his decision on the wording of section 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which he thought restricted the right to recover to the tenant "by whom it was "paid." He followed the decisions in the Irish courts in *Twomey* v. *Cronin*[2] and *Minto* v. *Cahill*.[3]

The plaintiff appealed.

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[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 14 (1): "Where any sum has, whether "before or after the passing of this "Act, been paid on account of any "rent . . . being a sum which is by "virtue of this Act or any Act re- "pealed by this Act, irrecoverable by "the landlord . . . the sum so paid "shall be recoverable from the land- "lord . . . who received the payment "or his legal personal representative "by the tenant . . . by whom it was "paid, and any such sum, and any "other sum which under this Act is "recoverable by a tenant from a land- "lord or payable or repayable by a "landlord to a tenant, may, without "prejudice to any other method of "recovery, be deducted by the tenant ". . . from any rent . . . payable by "him to the landlord. . . ."

Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1): "Subject "to the provisions of this section, on "the death of any person after the "commencement of this Act all causes "of action subsisting against or vested "in him shall survive against, or, as "the case may be, for the benefit of, "his estate. Provided that this sub- "section shall not apply to causes of "action for defamation or seduction "or for inducing one spouse to leave "or remain apart from the other or to "claims under section one hundred "and eighty-nine of the Supreme "Court of Judicature (Consolidation) "Act, 1925, for damages on the "ground of adultery."

[2] [1937] I.R. 324.

[3] [1940] I.R. 302.

J. Montgomerie for the plaintiff. The question is whether, if the tenant of rent-controlled premises dies before commencing proceedings against the landlord to recover rent overpaid, the right to recover that amount passes to the personal representative of the tenant. The county court judge held that the right did not pass, but was lost on the death of the tenant. It is submitted that on the true construction of section 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the tenant's right passes to her personal representative, for the benefit of her estate, notwithstanding that the section only mentions the personal representative of the landlord. Moreover, section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, does pass that right. The county court judge relied on two Irish cases, *Twomey* v. *Cronin*[4] and *Minto* v. *Cahill*,[5] but it is submitted that they should not be followed because they dealt only with personal rights of the tenant which did not pass to his representative. Under the Rent Acts the financial rights of the tenant do pass to his personal representative. The Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), enumerates its own exceptions, and it is submitted that anything not so enumerated is not excepted. There is therefore no room for the application of the rule of construction expressio unius exclusio alterius, of which, in *Colquhoun* v. *Brooks*,[6] Lopes L.J. said that "exclusio "was often the result of inadvertence or accident and the maxim "ought not to be applied when its application, having regard to "the subject-matter to which it is to be applied, leads to inconsistency or injustice." The county court judge thought that section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, was sufficient to pass the right to recover to the tenant's personal representative, but he felt bound to apply the rule of construction generalia specialibus non derogant. It is submitted that the legislature never intended by the Act of 1934 to restrict the right given to the tenant by section 14 (1) of the Act of 1920, and confirmed by a later Rent Act. This is not a common law claim but a claim dependent on statute, and it can only be taken away by very clear words, which are not to be found in section 14 (1). [*Bradley-Hole* v. *Cusen*[7]; *Attorney-General* v. *Canter*[8];

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[4] [1937] I.R. 324.

[5] [1940] I.R. 302.

[6] (1888) 21 Q.B.D. 52, 65; 4 T.L.R. 494.

[7] [1953] 1 Q.B. 300.

[8] [1939] 1 K.B. 318.

Sharp Brothers and Knight v. *Chant*[9]; *Darlington* v. *Roscoe & Sons*,[10] and *Peebles* v. *Oswaldtwistle U. D. C.*[11] were referred to.]

M. Chavasse for the defendant. The effect of section 14 (1) alone is clearly to grant a right to the tenant personally and not a right which devolves on the tenant's personal representative, but it imposes a liability on the landlord which may be transmitted, on the landlord's death, to his personal representative. If that is the correct interpretation, then, it is submitted, the position is not altered by the Law Reform (Miscellaneous Provisions) Act, 1934. The court must have careful regard to the words of section 14 (1), which describe and circumscribe the right which is given. The acceptance of an overpayment of rent is not a crime, and the section merely makes provision for the recovery of the overpayment by the tenant " by whom it was paid." The Act of 1920 by its limitation section shows that the right of recovery is circumscribed. The words of section 14 are tantamount to saying " by the tenant or mortgagor by whom it was " paid, but not by his personal representative." The words should be construed in their natural and ordinary meaning. It is a purely personal right which is given to the tenant, and the general words in the Law Reform (Miscellaneous Provisions) Act, 1934, cannot derogate from the specific words of an earlier statute, providing for certain specific objects, unless the intention to do so is clearly stated in the later statute: see *Corporation of Blackpool* v. *Starr Estate Co.*[12] Whatever the intentions of Parliament the court must determine the matter on the actual words of the section.

Cur. adv. vult.

May 4. The following judgments were read.

SINGLETON L.J. stated the facts and continued: The question which is to be determined arises under section 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Before I deal with that section, it is of some interest to notice the history of this legislation. Section 1 of the Rent Act, 1915, provided that where the rent of a dwelling-house to which the Act applied was increased above the standard rate as defined, the amount of that increase should be irrecoverable against the

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[9] [1917] 1 K.B. 771; 33 T.L.R. 235.

[10] [1907] 1 K.B. 219; 23 T.L.R. 167.

[11] [1896] 2 Q.B. 159.

[12] [1921] 1 A.C. 27; 38 T.L.R. 79.

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tenant, notwithstanding any agreement to the contrary. The Act did not give the tenant a right to recover the excess amount: see *Sharp Brothers and Knight* v. *Chant*,[1] in which it was held that money so paid was paid under a mistake of law and could not be recovered by the tenant. To remedy this omission a section was included in the Courts (Emergency Powers) Act, 1917. It is section 5, which for the purposes of this appeal may be regarded as in the same terms as section 14 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The Act of 1920 repealed section 5 of the Courts (Emergency Powers) Act, 1917, and in place of it substituted section 14 of the Rent Act, 1920, under which this appeal arises. The section provides that rent irrecoverable by the landlord under the Act, or any Act repealed by the Act, shall be recoverable from the landlord or his legal personal representative by the tenant by whom it was paid. It also provides that, without prejudice to any other method of recovery, any such sum may be deducted by the tenant from any rent payable by him to the landlord.

Thus a tenant who paid more than the recoverable rent was given a right to recover the excess amount as soon as he had paid it, and even though he had entered into an agreement to pay it. This right was something of value to the tenant; it was a right which was capable of assignment, and it was something which, in the event of his bankruptcy, would have passed to the trustee in bankruptcy for the benefit of the creditors. Now it is said that the right does not pass to the executor or personal representative of the tenant, and the county court judge so held. The basis of his decision is that the section, when giving a right to recover, gives it to the tenant without mention of his personal representative, whereas, when stating from whom the excess amount may be recovered, it specifies the landlord who has received the payment *or his personal representative*; from which it is said that it must be taken that the intention of Parliament was to make the right to recover a personal right in the tenant and one which does not pass to his personal representative.

If that is right it means that an asset of the tenant—a chose in action—which Parliament gave to him lasted as long as he lived, but was destroyed by his death. It requires clear words to take away a right so given. I am not sure that any good purpose is served, when considering a question of construction, in inquiring how or why the words "or his personal representa-"tive" came first into section 5 of the Courts (Emergency Powers) Act, 1917, after the words "from the landlord . . . who "received the payment." It is, however, interesting to notice the provision for deduction at the end of subsection (1) of that section as well as the like provision at the end of section 14 (1) of the Rent Act of 1920. It may well be that questions were raised when the Bill was before Parliament as to what would happen if there was a change of landlord by death. Would an executor be able to say: "I am not the landlord; it is only the landlord "against whom the excess amount can be recovered"? It is possible that some such discussion as this led to the insertion of the words "or his personal representative." However that may be, I find it difficult to see that an extension of the right of the tenant—if it is an extension, which I doubt—or a clarification of the position, is sufficient to deprive the tenant's estate of an asset given to the tenant by the section.

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[1] [1917] 1 K.B. 771; 33 T.L.R. 235.

It seems to me that the landlord's estate would have been liable to the tenant without the introduction of the words "or "his personal representative," and that those words must have been included to make it abundantly clear and to avoid uncertainty on a subject which would normally involve only small amounts, and on which it was particularly desirable to avoid uncertainty.

There have been two cases in Ireland in which it has been held, on similar statutory provisions, that the personal representative of the tenant could not recover. The first is a decision of the High Court, *Twomey* v. *Cronin*,[2] in which Johnston J. drew attention to the contrast disclosed between the person who may be the plaintiff and the person who may be the defendant in an action to recover money by virtue of a section in similar terms, and referred to it as striking and as indicating the intention of the legislature to draw the contrast. The second case, *Minto* v. *Cahill*,[3] was before the Supreme Court on a case stated. The Chief Justice said[4]: "But I can see no reason why the words "'or his legal personal representative' are introduced in the "subsection after the words 'the landlord . . . who received "'the payment' and are omitted after the words 'the tenant "'by whom it was paid' unless the legislature intended that, "while the liability to repay should be imposed on the personal "representative of the landlord, the right to recover the over-"payment should be conferred only on the tenant who made it."

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[2] [1937] I.R. 324, 328.

[3] [1940] I.R. 302.

[4] Ibid. 307.

Meredith J. said [5]: "The sums recoverable under section 15 "can only be recoverable by the persons indicated in the section. "In dealing with the right to recover, the section uses the words "'the tenant' but omits the words 'legal personal representative,' although these words are expressly mentioned in "connexion with the correlative duty to repay. The omission "forces the conclusion that the right to recover is conferred on "the tenant alone. The distinction is not meaningless. The "tenant may have agreed with his eyes open to pay a higher "rent than that permitted by the Act, and, having done so, it "may well be that his conscience did not allow him to go back "on his contract and set up a claim for overpaid rent, and this "may explain why the right to recover was confined by the "section to the tenant himself. The provisions of section 15 "are not penal, and the legislature may well have considered "that the personal representative should not be obliged to make "a claim for rent overpaid by a tenant who in his lifetime was "unwilling to make such a claim, and accordingly conferred the "right only on the tenant, to be exercised by him if he elected "to do so, and not otherwise."

Geoghegan J. said [6]: "To sustain this claim the plaintiff "must bring herself within the terms of section 15. That section "gives the right to 'the tenant by whom it (the rent) was paid.' "I am unable to find anything in the Act which makes this right "transmissible to the personal representative of the tenant."

Then O'Byrne J. said [7]: "Now, there is an obvious differentiation between the way in which the section deals with the "liability to repay and the right to recover. The liability to "repay is expressly imposed not only on the landlord but also "on his legal representative. If it were intended that the right "to recover overpayments should descend on the personal representative I do not see any reason why similar express language "to this effect was not inserted in the section. The insertion of "the words 'his legal personal representative' in relation to the "landlord's liability and the omission of similar words in relation "to the right to recover overpayments seems to me a clear "indication that the legislature did not intend to confer the "right to recover on the personal representative of the tenant."

I need hardly say that I approach the question with great respect to the judges of both courts. I would, however, point out that the question as to the nature of the right conferred upon the tenant does not seem to have been considered. Meredith J. said: "The omission forces the conclusion that the right to "recover is conferred on the tenant alone." Geoghegan J. said: "I am unable to find anything in the Act which makes this "right transmissible to the personal representative of the tenant." If the right which is given to the tenant is, as I have suggested, an asset, it is something which prima facie would on his death pass to his personal representative, whether it arises under the provisions of a statute or otherwise, unless there is something in the statute which clearly indicates that it is not to do so. The Sale of Goods Act, 1893, by section 49 (1), gives to a seller the right to recover the price of goods sold if certain conditions are fulfilled. It is a right given by statute though it was a re-statement of the position before the Act was passed. No one would contend that the right so given does not pass to the personal representative of the seller on the seller's death. The same applies in the present case unless there are clear words to take away the right so given. The right is there unless it is taken away.

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[5] [1940] I.R. 302, 309.

[6] Ibid. 310.

[7] Ibid. 311.

In *Darlington* v. *Roscoe & Sons*[8] it was held that where the sole dependant of a deceased workman, whose death was caused by accident arising out of and in the course of his employment, made a claim against his employers for compensation under the Workmen's Compensation Act, 1897, but died before any award was made, the right to compensation survived and passed to the legal personal representative of the deceased dependant.

Lord Collins M.R. referred to *Peebles* v. *Oswaldtwistle Urban District Council*,[9] and said[10]: "There an action was commenced "by a manufacturer for a mandamus to compel the defendants "under the Public Health Act, 1875, section 15, and the Rivers "Pollution Prevention Act, 1876, section 7, to make a sewer to "enable the plaintiff to dispose of the liquids proceeding from his "factory. The plaintiff died, and his executors applied to be "substituted as plaintiffs. It was held that, as the alleged cause "of action arose out of a statutory duty to the deceased, it "survived to his executors. Here a statutory duty, not to do "something, but to pay a sum of money, existed for the benefit "of the dependant when she died, and that case seems to me "a distinct authority that the right to performance of that duty "survived to her legal personal representative. Further, it was

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[8] [1907] 1 K.B. 219; 23 T.L.R. 167.

[9] [1896] 2 Q.B. 159.

[10] [1907] 1 K.B. 219, 227.

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"pointed out that the omission of any mention of the legal personal representative of a dependant in section 7, the definition "section, has not the effect of barring further proceedings on "the claim by such legal personal representative, for there is an "express provision, if one be needed, in rule 64 of the Workmen's Compensation Rules, 1898, which provides that 'where "'any matter or thing is not specially provided for under these "'rules, the same procedure shall be followed, and the same "'provisions shall apply, as far as practicable, as in a similar "'matter or thing under the County Courts Act, 1888, and the "'rules made in pursuance of that Act.' Therefore, unless from "the omission of any reference to the legal personal representative "of a dependant there can be inferred a positive inhibition of any "further claim of compensation after the death of the dependant, it is a mere case of an omission in the statute as to "machinery of procedure, which is made good by the statutory "rules. It has been pointed out that the statute contains no "mention of the legal personal representative of a deceased "doctor or undertaker entitled in respect of medical or funeral "expenses, but it cannot have been intended to inhibit a claim "in respect of such expenses by the legal personal representative. "I do not think that there is any evidence in the statute of any "intention to inhibit such a claim as that in the present case."

I am unable to regard the reference to the personal representative of the landlord against whom a claim can be made as sufficient to deprive the estate of the tenant of the benefit of a right, or an asset, which is given to him by the statute. There is no clear indication that the right is to be taken away in the event of the tenant's death before he has obtained payment. Thus I find myself unable to agree with the two judgments reported in the Irish Reports to which I have referred, or with the county court judge against whose judgment this appeal is brought.

A further point arises under section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, which reads: "Subject "to the provisions of this section, on the death of any person "after the commencement of this Act all causes of action "subsisting against or vested in him shall survive against, or, "as the case may be, for the benefit of, his estate. Provided "that this subsection shall not apply to causes of action for "defamation or seduction or for inducing one spouse to leave "or remain apart from the other or to claims under section "one hundred and eighty-nine of the Supreme Court of Judi-"cature (Consolidation) Act, 1925, for damages on the ground "of adultery." This section is in wide terms: "All causes "of action subsisting against or vested in him shall survive "... for the benefit of his estate."

The cause of action given to a tenant by section 14 of the Rent Act, 1920, is at the lowest a personal right conferred upon the tenant. If I am wrong in that which I have said above and if section 14 did not confer a right which passed to the personal representative of the tenant, the effect of section 1 of the Act of 1934 is that the cause of action so given shall survive for the benefit of his estate. Section 1 (1) of the Act of 1934 contains a proviso that it shall not apply to certain causes of action. Apart from those excluded it is to apply to all causes of action, and it appears to me that it is sufficient to cover the claim in this case. The county court judge felt considerable doubt on this part of the case, though his judgment was against the plaintiff who appeals to this court. In my opinion the appeal should be allowed and judgment should be entered for the plaintiff for the amount claimed.

I should like to add that we are greatly indebted to both the counsel who put the various points before us so clearly, and who showed that they had taken care to make themselves fully acquainted with the law upon the subject.

JENKINS L.J. It seems to me reasonably plain that the intention of section 14 (1) of the Act of 1920, as of its precursor, section 5 of the Act of 1917, must have been to create a statutory relationship of debtor and creditor between the landlord and the tenant in respect of any rent made irrecoverable by the landlord by the provisions of section 1 of the Act of 1920, or its precursor, section 1 of the Act of 1915, but in fact paid to him by the tenant, so that the tenant should be able not only to refuse to pay it, but to recover it from the landlord if in fact paid. To this end, it was necessary to fix the landlord with the character of a debtor in respect of the amount in question and to designate the tenant as the creditor to whom he was to be held indebted. This it was sought to do by the words "the sum so paid shall be recoverable from the landlord "... who received the payment or his legal personal repre-"sentative by the tenant ... by whom it was paid."

On the strength of the inclusion of a reference to the landlord's legal personal representative in the designation of the

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debtor, and the omission of any reference to the tenant's legal personal representative in the designation of the creditor, it is argued on the part of the landlord in the present case that the tenant's right to recover the amount is personal to, and dies with, the tenant, and the county court judge has so held following the two Irish decisions of *Twomey* v. *Cronin* [11] and *Minto* v. *Cahill* [12] to which my Lord has referred. I find it impossible to accept this view, which involves construing section 14 (1) as if it provided that "the sum so paid shall be recoverable "from the landlord . . . who received the payment or his legal "personal representative by the tenant . . . by whom it was "paid, *but not by the personal representative of such tenant.*" It is only by recasting the section in this way that the landlord's contention can be supported, for unless words excluding the tenant's personal representative must by necessary implication be read into it, the position can only be that the section invests the tenant with the character of a creditor of the landlord in respect of the sum in question, which sum has all the incidence of a debt, including the devolution upon the creditor's legal personal representative of the right to recover it after the death of the creditor.

I see no justification for any such implied exclusion of the tenant's personal representative. It may well have been thought necessary, or ex abundanti cautela desirable, to include an express reference to the landlord's personal representative in defining the nature and extent of the liability laid upon him by the enactment, so as to leave no doubt that his liability was to be the ordinary liability of a debtor, but unnecessary to do more in defining the right of the tenant to recover the amount in question than to give him simpliciter the right of recovery, which would in itself clearly suffice to constitute the amount in question a debt owing to the tenant from the landlord or his personal representative, with all the ordinary incidence of a debt as regards assignment, devolution on death, and so forth.

The argument for the landlord is summed up in the maxim expressio unius exclusio alterius, which, applied to the present case, is said to compel the conclusion that the express reference to the legal personal representative of one of the parties excludes any implied reference to the legal personal representative of the other. But this maxim is, after all, no more than an aid to construction, and has little, if any, weight where it is possible, as I think it is in the present case, to account for the "inclusio "unius" on grounds other than an intention to effect the "exclusio alterius." In this connexion, I think that there is force in the suggestion made by Mr. Montgomerie for the appellant legal personal representative that the express reference to the legal personal representative of the landlord might, in view of the retrospective operation of section 5 of the Act of 1917, by which the right to recover overpayments was first given to the tenant, have been intended to meet the case of an overpaid landlord dying before the commencement of the Act, whose estate might otherwise have escaped liability on the ground that he had never been liable himself.

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[11] [1937] I.R. 624.

[12] [1940] I.R. 302.

In *Colquhoun* v. *Brooks*[13] Lopes L.J. said: "The maxim "'expressio unius, exclusio alterius,' has been pressed upon us. "I agree with what is said in the court below by Wills J. about "this maxim. It is often a valuable servant, but a dangerous "master to follow in the construction of statutes or documents. "The exclusio is often the result of inadvertence or accident, "and the maxim ought not to be applied, when its application, "having regard to the subject-matter to which it is to be applied, "leads to inconsistency or injustice." In my opinion the application of the maxim here would lead to inconsistency and injustice, and would make section 14 (1) of the Act of 1920 uncertain and capricious in its operation.

I am by no means clear about the nature and incidence of the limited right which, according to the landlord's argument, is all that a tenant can claim under the section. Is it a purely personal right enforceable only by the tenant himself personally and neither assignable nor liable to vest in his trustee in bankruptcy? Such a right would indeed be a legal curiosity. Or is it to be regarded as carrying all the normal incidence of a debt as regards assignment and so forth so long as the tenant lives, but ceasing to exist on his death? This would be hardly less curious. If the right has all the other characteristics of a debt, why should it be denied the normal incidence of devolution upon the legal personal representative of the creditor? I cannot help thinking that if the legislature had intended to give the tenant something less than the full rights of a creditor the section would have been framed so as to include some attempt at a definition of the nature and extent of the limited right which the tenant was to have.

[13] (1888) 21 Q.B.D. 52, 65.

I do not think the landlord's argument is advanced by the reference in section 14 (1) to "the tenant . . . by whom it was "paid." These words, with the reference to "the landlord ". . . who received the payment," serve, in my view, merely to identify the debtor and creditor and not to qualify the obligations or rights of the persons so identified as debtor and creditor respectively. Nor am I impressed by the argument that in general the rights conferred on tenants by the Rent Acts are personal rights, and that accordingly the right conferred by section 14 (1) should be regarded as personal to the tenant. I accept the distinction drawn by Mr. Montgomerie between rights of possession and financial provisions, which is supported by the case to which he referred on this point of *Carter* v. *S.U. Carburetter Co.*[14]

The argument to the effect that the tenant might prefer not to take proceedings to recover the overpayments and to honour the contract actually made although legally unenforceable, and accordingly that a personal right to recover any overpayments which he alone could exercise or not as he pleased, would be appropriate, seems to me to be offset by the consideration that if the landlord's construction of section 14 (1) of the Act of 1920 were to prevail, the claim of a tenant who did not want to recover rent overpaid and duly issued a writ for that purpose would be defeated by his death before judgment. For these reasons I think that upon the true construction of section 14 (1) the appellant here should succeed. Even if the appellant, contrary to my view, cannot establish his claim by the unaided operation of section 14 (1), there is, to my mind, no such express exclusion of the personal representative of a tenant as would be required to oust the application in the appellant's favour of the provisions of section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934. Accordingly I think that this appeal should be allowed.

MORRIS L.J. The questions raised in this appeal are twofold: (a) whether, if a tenant of a dwelling-house to which the Rent Acts apply pays rent beyond the permitted rent so that there are sums which he can recover, and if he dies without having had recovery of them, his personal representatives have (apart from the Law Reform (Miscellaneous Provisions) Act of 1934) a claim which they can assert; and (b) whether, in the circumstances stated, such Act of 1934 makes possible the assertion of a claim.

[14] [1942] 2 K.B. 288; 58 T.L.R. 348; [1942] 2 All E.R. 228.

If an amount of overpaid rent is constituted a debt to which the tenant who has overpaid is entitled, then, on general principle, it would be natural to suppose that the personal representatives of a deceased tenant could (subject to any statutory time limitations) recover that which the deceased tenant had the right to recover. The submission that they are not so entitled depends entirely upon a contention that an implication may be deduced from a consideration of the wording of section 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

When the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, was passed, section 1 provided that: "Where the rent of a dwelling-house to which this Act applies " . . . has been, since the commencement of the present war, or " is hereafter during the continuance of this Act, increased above " the standard rent . . . as herein-after defined, the amount by " which the rent . . . payable exceeds the amount which would " have been payable had the increase not been made shall, " notwithstanding any agreement to the contrary, be irrecoverable." It was, however, not made an offence to receive more than the permitted amount, and there was no provision enabling overpaid sums to be recovered. In *Sharp Brothers and Knight* v. *Chant*[15] it was held in this court that although the Act of 1915 provided that the increase beyond the standard rent was not recoverable by the landlord if the tenant had not paid it, yet the tenant, having paid it under a mistake of law, was not entitled to recover it from the landlord in any shape or form.

In July, 1917, the Courts (Emergency Powers) Act, 1917, was passed, and by section 5 (1) it was enacted, so far as is now material, as follows: "Where any sum has, whether before or " after the passing of this Act, been paid on account of any " rent . . . being a sum which by virtue of the Increase of Rent " and Mortgage Interest (War Restrictions) Act, 1915, would " have been irrecoverable by the landlord . . . the sum so paid " shall at any time within six months after the date of payment, " or, in the case of a payment made before the passing of this " Act, within six months after the passing thereof, be recoverable " from the landlord . . . who received the payment or his legal " personal representative by the tenant . . . by whom it was paid, " and may, without prejudice to any other method of recovery,

[15] [1917] 1 K.B. 771.

"be deducted by such tenant . . . from any rent . . . payable "within such six months by him to such landlord. . . ."

The language of section 14 (1) of the Act of 1920 (to which I will later refer) bears close relation to the wording of section 5 (1) of the Act of 1917. It is said that there is a contrast between the words "be recoverable from the landlord . . . who received "the payment or his legal personal representative" and the words "by the tenant . . . by whom it was paid," which points to the conclusion that only recovery by the tenant personally and in his lifetime is permitted. It is said that the omission after the word "tenant" of the words "or his legal personal representative" is pointed and is pregnant with significance. The significance is said to be that the legislature must be taken to have given only a limited right of recovery to the tenant, that is, a right which will disappear when the tenant dies. But this is not expressly so enacted, and it would be surprising if the notion of a debt owing to the tenant, which ceased to be a recoverable debt on the tenant's death, should be introduced not by direct provision, but by way of an inference to be drawn.

By the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, there was a repeal of section 5 of the Courts (Emergency Powers) Act, 1917, but the provisions of that section were to a considerable extent re-enacted in section 14 (1) of the Act of 1920. So far as here material the terms of section 14 (1) are: "Where any sum has, whether before or after the passing of this "Act, been paid on account of any rent . . . being a sum which "is by virtue of this Act, or any Act repealed by this Act, "irrecoverable by the landlord . . . the sum so paid shall be "recoverable from the landlord . . . who received the payment "or his legal personal representative by the tenant . . . by whom "it was paid, and any such sum, and any other sum which under "this Act is recoverable by a tenant from a landlord or payable "or repayable by a landlord to a tenant, may, without prejudice "to any other method of recovery, be deducted by the tenant . . . "from any rent . . . payable by him to the landlord. . . ."

It was provided by section 1 of the Act of 1920 that the amount of any rent in excess of that which the Act permitted should "be irrecoverable from the tenant." It may also be noticed that section 8 of the Act of 1920 (now repealed by and replaced by section 2 of the Act of 1949) imposed restrictions upon requiring the payment of any fine, premium or other like sum, or the giving of any pecuniary consideration in addition to the rent; and, subject to the provisions of the section, the amount or value of any such payment or consideration was made "recoverable by "the person by whom it was made or given."

It will be seen that section 14 (1) of the Act of 1920 did not specify any time limits for the recovery of sums paid in excess of the permitted amounts. Section 8 (2) of the Act of 1923 provided: "Any sum paid by a tenant . . . which, under section "14 (1) of the principal Act is recoverable by the tenant . . . "shall be recoverable at any time within six months from the "date of payment but not afterwards, or in the case of a payment "made before the passing of this Act, at any time within six "months from the passing of this Act but not afterwards." The period of six months was extended to two years by section 7 (6) of the Act of 1938, which provides: "The period "fixed by section 8 (2) of the Act of 1923 for the recovery by "a tenant . . . of certain over-payments is hereby extended, in "relation to payments made not earlier than six months before "the passing of this Act, to two years from the date of payment."

In the case now under consideration there was an agreement in writing creating a contractual tenancy for a term of seven years from December 25, 1947. The agreed rent considerably exceeded the recoverable rent. On May 9, 1949, Agnes Bligh became the assignee of the remainder of the term and thereafter paid the agreed rent. She died on January 17, 1954. It seems clear that on January 16, 1954, she had a statutory right to recover the excess amounts that she had paid in the previous two years. It is said that the obligation of the landlord to repay the excess amounts received became extinguished upon the death of the deceased. No claim was in fact made until January 12, 1955, by which date some part of what the deceased could in her lifetime have recovered had in any event become irrecoverable.

As the right to recover overpayments of rent is statutory, the question as to the extent of the right which is given must depend upon a construction of the words used by the legislature. Since the provisions of section 14 of the Act of 1920 considerably follow and re-enact the provisions of section 5 of the Courts (Emergency Powers) Act, 1917, it is perhaps appropriate more particularly to consider that section. The matter must, however, be looked at against the background of the general law. If A owes a debt to B it does not become extinguished on the death of B. Nor does A's liability to B cease on the death of A. If the legislature is creating a new statutory liability as between A and B it might be necessary to provide for the situations where either A or B had died before the legislation was passed. If it is provided that

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there is to be a liability in A or his personal representative to pay to B, it would normally follow that a right once possessed by B to receive money would pass on B's death to his personal representative. If B is given a right to receive money it would require clear language to enact that B's right is to cease unless it is satisfied before his death.

The general rule is thus stated in Williams on Executors, 13th ed., at p. 347: "With respect to such personal actions as are "founded upon any obligation, contract, debt, covenant, or other "duty, the general rule has been established from the earliest "times, that the right of action on which the testator or intestate "might have sued in his lifetime survives his death, and is transmitted to his executor or administrator." In Comyns' Digest—Administration (B. 13)—it is stated: "An executor or administrator may have an action upon a judgment, statute, recognizance, obligation, or other specialty made to his testator or "intestate." Again, in Williams (p. 348), it is stated: "Thus "an executor or administrator may recover debts of every "description due to the deceased, either debts of record as "judgments, or recognizances, or debts due on special contracts, "as for rent, or arrears of a rentcharge; or on bonds and "covenants under seal; or debts on simple contracts and "promises not in writing, either express or implied."

It was enacted, reproducing earlier legislation, by the Administration of Estates Act, 1925, s. 26 (1), that: "For any "debt (including arrears of rent) due to a deceased person . . . "his personal representative shall have the same right of action "as the deceased would have had if alive." That subsection ceased to have effect upon the passing of the Law Reform (Miscellaneous Provisions) Act, 1934.

When considered against the background of the general law, it seems to me that the mere fact of the inclusion of the words "or his legal personal representative" after the word "landlord," and their omission after the word "tenant" forms inadequate and insufficient reason for deciding that the legislature intended to give to a tenant a right of recovery not possessing the ordinary incidence of such a right, but one that should expire with him, and (as seems to be implicit in the landlord's submissions) one that could not avail for the benefit of an assignee or of creditors in the event of a bankruptcy. When in July, 1917, the Courts (Emergency Powers) Act, 1917, was passed, it may be that consideration was given to the situations where either a landlord who had received overpayments or a tenant who had overpaid had died before the Act was passed. In the case of such a landlord he would not (apart from what was enacted) have been under legal liability. In the case of such a tenant he would not have died possessed of any right to recover. It may be that it was decided to make liable the estate of a landlord who had died before the passing of the Act, without giving to the estate of a tenant who had died before the passing of the Act a right of which he did not die possessed. But whether this is, or is not, the explanation of the wording of the Act of 1917, it seems to me that very different wording would have been adopted if there had been the intention to create, for the benefit of a tenant, a debt or a right to recover a sum of money to which was attached the somewhat novel feature that the death of the creditor should destroy it. But it was submitted on behalf of the landlord that if a tenant presented a valid claim for the return of overpaid sums, and not having received payment, started an action to recover such sums, and then died before the case was heard, the sums ceased to be due.

The maxim "expressio unius exclusio alterius" was relied upon. In considering the application of this maxim it is desirable to have in mind the warnings expressed by Wills J. and by Lopes L.J. in *Colquhoun* v. *Brooks*.[16] Wills J. said: "I may "observe that the method of construction summarized in the "maxim 'expressio unius exclusio alterius' is one that certainly "requires to be watched. Perhaps few so-called rules of inter-"pretation have been more frequently misapplied and stretched "beyond their due limits. The failure to make the 'expressio' "complete very often arises from accident, very often from the "fact that it never struck the draftsman that the thing supposed "to be excluded needed specific mention of any kind; and the "application of this and every other technical rule of construc-"tion varies so much under differing circumstances, and is open "to so many qualifications and exceptions, that it is rarely that "such rules help one to arrive at what is meant. Certainly in "the present case the only use of the maxim in question is to "summarize in four words the argument upon this point for the "Crown."

Lopes L.J., in the Court of Appeal, referred to the maxim as often being "a valuable servant but a dangerous master." Doubtless there are instances where matters expressly mentioned may be regarded as comprehensive, complete and all-inclusive.

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[16] 19 Q.B.D. 400, 406; 21 Q.B.D. 52.

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But I fail to see that the maxim can be applied to the provision in the 1917 and 1920 enactments. Decisions of policy might account for the provisions enacted. Furthermore, if the maxim is being considered, I should have thought that it ought to be considered separately in regard to the landlord's position and in regard to the tenant's position. A provision that a sum shall be recoverable "by the tenant . . . by whom it was paid" does not in relation to the tenant set out any express words which by their mention must exclude other words not mentioned.

I have considered with every respect the opinions expressed in *Twomey* v. *Cronin*[17] and *Minto* v. *Cahill*,[18] but for the reasons which I have set out, I consider that the right of recovery given by section 14 (1) of the Rent Act, 1920, to a tenant who has overpaid is a right that can devolve to his personal representatives.

On this view the personal representatives of a tenant who had an unsatisfied right to recover overpaid rent would not need to have recourse to the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934. The opening words of section 1 (1) of that Act are, however, if they had to be relied upon, amply wide enough to cover the claims now being considered. The argument for the landlord in regard to this Act, presented on the assumption that section 14 (1) of the Rent Act, 1920, gave a limited right to a tenant only during his lifetime, was based upon an application of the maxim "Generalia specialibus non derogant." Reliance was placed upon *Blackpool Corporation* v. *Starr Estate Co.*[19] Lord Haldane, in his speech, said[20]: "My Lords, in that "state of matters we are bound, in construing the general "language of the Act of 1919, to apply a rule of construction "which has been repeatedly laid down and is firmly established. "It is that wherever Parliament in an earlier statute has directed "its attention to an individual case and has made provision for "it unambiguously, there arises a presumption that if in a subsequent statute the legislature lays down a general principle, that "general principle is not to be taken as meant to rip up what "the legislature had before provided for individually, unless an "intention to do so is specially declared. A merely general rule "is not enough, even though by its terms it is stated so widely "that it would, taken by itself, cover special cases of the kind "I have referred to. An intention to deal with them may, of "course, be manifested, but the presumption is that language

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[17] [1937] I.R. 324.

[18] [1940] I.R. 702.

[19] [1921] 1 A.C. 27; 38 T.L.R. 79.

[20] [1921] 1 A.C. 27, 34.

"which is in its character only general refers to subject-matter "appropriate to class as distinguished from individual treatment. "Individual rights arising out of individual treatment are pre-"sumed not to have been intended to be interfered with unless "the contrary is clearly manifest."

Lord Cave said[21]: "But even if it were otherwise, and if it "could be said that the land was 'authorized to be acquired "'compulsorily,' it would still, in my opinion, stand outside the "Act of 1919. The rule is clear that a general statute will not, "in the absence of clear words, be construed as derogating from "special provisions in a previous statute. Generalia specialibus "non derogant, and when the legislature has given its attention "to a particular subject and made provision for it, the presump-"tion is that a subsequent and general enactment is not intended "to interfere with the special provision unless the intention so "to do is clearly manifested (see the rule as stated by Lord "Hobhouse in *Barker* v. *Edger*[22])." The Blackpool Improvement Act, 1917, had enacted for the benefit and protection of a certain company, as owners of certain land, what provisions were to be applicable when the owners sold the land to the corporation. It was held that in the dealings between the owners and the corporation the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919, did not apply for the reason that the Act of 1917 had specified which provisions were to apply. But that was a very different case from the present one. There had in that case been a specific and individual bargain.

In my view the Act of 1934 enumerated its own exceptions and, at a date when the provisions of Rent Act legislation were much in operation, it contained no words which would prevent the application of the Act to a cause of action possessed by a tenant for the recovery of rent which he had paid over and above what was properly due. I therefore consider that the appeal should be allowed.

Appeal allowed.

Solicitors: *Randolph & Dean; Pettiver & Pearkes.*

A. W. G.

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[21] [1921] 1 A.C. 27, 38.

[22] [1898] A.C. 748, 754.

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Lord Goddard C.J., Cassels and Devlin JJ.

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Denning and Parker L.JJ. and Upjohn J.

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REGINA *v.* AGRICULTURAL LAND TRIBUNAL (SOUTH WESTERN PROVINCE). *Ex parte* BENNEY.

Agriculture — Supervision or dispossession order — Representations by farmer—Appointment by Minister of county agricultural executive committees to hear representations — Delegation to husbandry sub-committee — Hearing of representations by sub-committee — "No "officers or servant of a county agricultural executive committee, "or any sub-committee or district committee thereof shall be "appointed . . . to receive representations" — Sub-Committee entitled to receive representations—Presence of clerk to committee —Dispossession order—Acreage affected incorrectly stated—Order invalid—Agriculture Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 48), *ss.* 12, 17 (1) (2), 74 (4), 104 (1) (4) (5)—*Agriculture (Scotland) Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 45), *s.* 80 (5).

Conflict of Laws—Scottish and English law—Construction of statute—Corresponding section—Grammatical change in later Scots section.

On the true construction of section 104 (5) of the Agriculture Act, 1947, a sub-committee or a district committee of a county agricultural executive committee is not excluded from being "a person" who may be appointed by the Minister under section 12 (1) to hear representations by a farmer against the making against him of a supervision order under section 12 or a dispossession order under section 17 in relation to farming of the land owned or occupied by him.

By the terms of the statute, the Minister may appoint himself to hear the representations or may appoint some other person to do so. Such other person need not be a single individual, but may include such a body as a sub-committee who will hear the representations and report thereon to the Minister. At a hearing by a sub-committee so appointed, an official, such as a land agent, may be present to act as clerk to the tribunal for the purpose of making notes of the proceedings and compiling a report, which must be approved by the members of the sub-committee; but such official must take no part in the deliberations of the tribunal.

Where in an order for dispossession by the Minister the extent of the acreage affected differs from that dealt with in the report of the Agricultural Land Tribunal the dispossession order is invalid, since, by section 74 (4) of the Act, the Minister shall act in accordance with the report and not otherwise.

Decision of the Divisional Court reversed.

APPLICATIONS for orders of certiorari.

REGINA *v.* MINISTER OF AGRICULTURE AND FISHERIES:
Ex parte GRAHAM.

In the first application the applicant, Thomas Longstaffe Graham, a farmer in the county of Durham, applied for an order of certiorari to bring up and quash an order for supervision dated January 22, 1954, made against him by the Minister of Agriculture and Fisheries under the Agriculture Act, 1947, s. 12.[1] The steps in relation to the making of the supervision order were as follows: On November 25, 1953, two

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[1] Agriculture Act, 1947, s. 12 (1): "Where the Minister . . . is satisfied "that the owner of agricultural land "is not fulfilling his responsibilities "to manage the land in accordance "with the rules of good estate man-"agement, or that the occupier of an "agricultural unit is not fulfilling his "responsibilities to farm the unit in "accordance with the rules of good "husbandry, the Minister, after "affording to the owner or occupier, "as the case may be, an opportunity "of making representations to the "Minister, whether in writing or on "being heard by a person appointed "by the Minister, may by order "(. . . a 'supervision order') place "the owner . . . or the occupier under "the Minister's supervision. . . ."

S. 17: "(1) Where a supervision "order is in force in relation to the "farming of an agricultural unit, and "the Minister is satisfied that the "farmer thereof does not . . . show "satisfactory improvement, then sub-"ject to the provisions of this section—"". . . (*b*) where . . . the occupier "is the owner . . . the Minister shall "have power by order to direct that "". . . the occupier shall give up his "occupation of that land . . . and let "it to a tenant approved by the "Minister. (2) The Minister shall "not make an order under the last "foregoing subsection until, after "affording to the occupier . . . an "opportunity of making representa-"tions to the Minister, whether in "writing or on being heard by a "person appointed by the Minister. "". . . (3) An occupier or owner to "whom notice of a proposal is given "under the last foregoing subsection "may require that the proposal shall "be referred to the Agricultural Land "Tribunal. . . ."

S. 71 (3): "A county agricultural "executive committee may with the "approval of the Minister, and "shall if the Minister so requires, "appoint . . . sub-committees, and "". . . shall refer to a sub-committee "for report and recommendation such "matters as may be determined by "the committee with the approval of "the Minister or as may be required "by the Minister, and shall delegate "to a sub-committee such of the func-"tions of the committee . . . as may "be so determined or required."

S. 72: "The Minister may make "regulations providing for delegating "to a county agricultural executive "committee . . . such of his func-"tions—(*a*) under this Act; . . . as "may be so specified."

S. 74: "(1) In any case where by "any of the provisions of this Act a "person is empowered to require that "a proposal of the Minister to take "any action shall be referred to the "Agricultural Land Tribunal, then "if . . . the said person so requires, "the proposal shall be referred accord-"ingly. (4) Where such a reference "is duly required the Minister shall "act in accordance with the report of "the tribunal and not otherwise."

S. 104 (1): "Any enactment in "this Act providing, in relation to "the taking of any action by the "Minister, for his taking the action "after affording a person an oppor-"tunity to make representations to "the Minister, whether in writing

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members of the husbandry sub-committee, which was appointed by the county agricultural executive committee, under powers delegated to them by the Minister, inspected the farm in question accompanied by one Stroh, the county land agent. On December 4, 1953, Stroh, acting on behalf of the county committee, sent a notice to the farmer in which it was stated that the Minister had under consideration a proposal to place him under supervision and notified him that if he wished to be heard in opposition to the making of the order, an opportunity would be afforded him. On receiving the notice, the applicant appointed one Twizell, a land agent, to act for him. On December 14, 1953, the county land agent wrote to Twizell saying that the matter would be considered by the husbandry sub-committee at their meeting on January 7, 1954. At the hearing on that date, there were present seven members of the husbandry sub-committee, and Stroh, the county land agent, sat with them. Four of the members of the sub-committee were also members of the county committee, but three, who were outside persons who had been added to the sub-committee by the county committee, were not. Only one of the members of the husbandry sub-committee who had inspected the farm was present at the meeting. At the outset, Twizell, on behalf of the applicant, submitted that the husbandry sub-committee was not a proper

"or on being heard by a person "appointed by the Minister, shall be "construed as a provision that the "Minister shall comply with the "following requirements. . . . (4) If, "whether or not representations are "made to the Minister in writing, "the said person within the pre"scribed time and in the prescribed "manner requires that an oppor"tunity be afforded to him of being "heard by a person appointed by the "Minister for the purpose, such an "opportunity shall be afforded to him "and, on the same occasion, to any "other person to whom under the "enactment referred to in sub"section (1) of this section the "Minister is required to afford such "an opportunity, and the Minister "shall not take the action in question "until he has considered any repre"sentations made at the hearing. "(5) No officer or servant of a county "agricultural executive committee, or "any sub-committee or district com"mittee thereof, shall be appointed "under the last foregoing subsection "to receive representations relating to "land in the area of the committee."

The Agriculture (Delegation to County Agricultural Executive Committees) Regulations, 1948, reg. 1: "The functions of the Minister "relating to agriculture specified in "the schedule hereto shall . . . be "exercisable by a county agricul"tural executive committee in accord"ance with the provisions of section "71 of the Act. Schedule. Making "supervision orders. . . . Giving "notice of a proposal to make an "order under section 17 (1) of the "Act. . . . Taking any action neces"sary to or incidental to affording "any person . . . an opportunity to "make representations, including the "appointment of persons to hear and "the consideration of such representa"tions. . . ."

person to receive the applicant's representations under section 104 (5) of the Act. Stroh submitted that the sub-committee was a proper person by virtue of the provisions of section 71 (3) and (5) of the Act, which enabled a county committee to delegate its functions to a sub-committee. Stroh also expressed his opinion on the meaning of section 104 (5) of the Act. The chairman ruled that the sub-committee was authorized to receive the representations. Evidence was then given by the applicant and an accountant; a submission was made on the merits of the case and the applicant and his representative withdrew. Throughout the hearing, Stroh had continued to sit next to the chairman and he remained when the farmer and his representative left. He stayed with the sub-committee during their deliberations so as to be able to record their decision, but he took no part in their deliberations. The sub-committee were unable to come to a decision themselves, and referred to the county committee the question whether a supervision order should be made or not. On January 21, 1954, the county committee met and received the report of the husbandry sub-committee. Stroh was not present on that occasion. After considering the report, the county committee decided that the farmer should be placed under supervision as regarded the farming of his farm and on January 22, 1954, he received notice from the county committee that he had been placed under supervision by the Minister.

Kenneth Diplock Q.C. and *J. R. Cumming-Bruce* for the applicant Thomas Longstaffe Graham.

Sir Harry Hylton-Foster Q.C., S.-G. and *B. S. Wingate-Saul* for the Minister.

REGINA *v.* AGRICULTURAL LAND TRIBUNAL (SOUTH WESTERN PROVINCE). *Ex parte* BENNEY.

In the second application the applicant, George Herbert Benney, was the owner for life of Tucoyse Farm, Constantine, Cornwall, the property consisting of a farm-house, a cottage and 155 acres of land. On December 31, 1951, the Cornwall County Agricultural Committee made a supervision order under section 12 of the Act of 1947 against the applicant, which was registered as a land charge, together with a plan showing 151 acres as subject to the charge. Four acres were by oversight omitted. During 1952 detailed directions were served on the applicant, and he substantially complied with them.

At the end of the first twelve months the committee held a review of the farming as required by the statute, and in consequence the supervision order was continued for another six months until June 30, 1953. No directions were served during that time. At the end of this six months another review was held. In consequence, on September 15, 1953, the county land agent, one Griffiths-Jones, wrote to the applicant informing him that it had been decided to proceed with a proposal to terminate his interest in the holding and telling him that he had a right to make representations to the husbandry sub-committee. On October 8, 1953, the husbandry sub-committee held a meeting which was attended by the applicant and one Thomas, an estate agent whom he had employed to represent him. On December 30, 1953, the county land agent wrote to the applicant giving him notice that the Minister proposed to make an order terminating his occupation of the farm on the ground of bad husbandry and requiring him to let it to a tenant approved by the Minister.

There was enclosed in this letter a statement of the general grounds for the proposal which read as follows: "Statement of "general grounds for proposal. At the time the supervision order "was made production from this farm was not considered satis-"factory. Owing to the poor condition of the grassland the yield "of milk from 18 milking cows was low and the total of 47 "cattle was considered altogether inadequate. Seasonal work "was inclined to be backward, spring crops were planted late "and yields were low. During the first year of supervision "detailed directions were served. These were mostly complied "with although the occupier was late with the work in some "instances and not thorough in others. At the time of the "annual review it was considered that there had been an improve-"ment in the condition of some of the pastures on the north part "of the farm through better grazing by the stock available, but "the management of the remainder showed no improvement. "The supervision order was continued for a further six months "and no directions were served. At the review it was found that "the number of cattle on the holding had increased to 61 "(including 15 calves) of which 20 were milking cows. The "cattle, however, were in poor condition for the time of the year "and were grazing on rather bare inferior pastures whilst after-"maths in several fields remained ungrazed. Milk yields were "still very low for a holding which is being run principally as a "dairy holding. Corn crops were light. The Minister is satisfied "that as a result of the period of supervision there has been little "or no improvement in the management of the farm, and that "the occupier has not shown that he is able or willing to maintain "a reasonable standard of production on the holding."

The applicant gave notice of appeal and the matter came before the Agricultural Land Tribunal for the south-western province. The county land agent, in accordance with the rules of procedure, furnished a plan of the land concerned. It showed the same 151 acres which were subject to the supervision order and omitted the four acres.

On March 3, 1954, the tribunal heard the case, the applicant being represented by a solicitor and the Minister by counsel. The applicant's case was that the farm was not primarily a dairy farm, but mainly a sheep-rearing farm; that none of the land was valuable and that he was unable to see why the Minister sought to deprive him of his living which he had made satisfactorily since 1931 out of a relatively poor farm. In addition, the applicant and his solicitor pointed out that the plan was wrong because it omitted the four acres, but the chairman said that the tribunal was only concerned with the 151 acres shown on the plan.

On March 4, 1954, the tribunal dismissed the applicant's appeal. On April 30, 1954, the Minister made an order that the land comprised in the agricultural unit should be given up by the applicant as from September 29, 1954, and that the applicant should, as from that date, let it to a tenant approved by the Minister. In the schedule to the order, however, the land was set out and it comprised, not merely the 151 acres, but the whole 155·321 acres.

On August 9, 1954, Benney applied to the High Court to quash the order.

The following report of the argument on the application of George Herbert Benney is confined to the issues referred to in the judgments of the Divisional Court.

Kenneth Diplock Q.C. and *Gilbert Dare* for the applicant. The delegation by the county agricultural executive committee of powers to make proposals for dispossession to a sub-committee is not authorized by the Agriculture Act, 1947, and the delegation to the husbandry sub-committee was, therefore, invalid. Section 72, which empowers the Minister to delegate, limits the delegation to county agricultural executive committees. The principle delegatus non potest delegare is relied on; and see *Allingham* v. *Ministry of Agriculture and Fisheries.*[2] The words "functions

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[2] (1948) 64 T.L.R. 290; [1948] 1 All E.R. 780.

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"of the committee" in section 71 (3) mean the functions which the committee has as such, not the functions of the Minister which the committee has as a result of delegation by the Minister.

[DEVLIN J. It is plain from section 71 (3) that a committee may have functions delegated to it, but if that argument is correct all that a sub-committee may do is to promote agricultural development and efficiency, and nothing else.]

The sub-committee may make recommendations and reports.

Assuming that the delegation of powers to make proposals for dispossession to the sub-committee was good, the authority granted to them to hear representations was bad. On the true construction of section 104 (5) the husbandry sub-committee was excluded from hearing the applicant's representations; that subsection must be read literally as meaning what it says. Subsection (4) of section 104 and sections 12 and 17 of the Act require that the Minister must afford to an aggrieved person an opportunity of being heard by a person appointed by the Minister for the purpose. The Minister cannot, therefore, hear the representations himself, and if he cannot, the sub-committee, who are his delegates, cannot do so either. The person appointed to hear the representations must be an independent person, other than the person authorized to make the proposal for dispossession.

In *Regina* v. *Minister of Agriculture and Fisheries; Ex parte Graham*,[3] only a certain number of the members of the sub-committee were present at the hearing of the representations, but if, by virtue of the Interpretation Act, 1889, "persons" may be appointed instead of a "person," they must be appointed individually, and not as a body. "Person" in this context in the Act of 1947 cannot be read to mean "a body of persons acting "by a particular majority or quorum."

Sir Harry Hilton-Foster Q.C., S.-G. and *B. S. Wingate-Saul* for the Minister.

[LORD GODDARD C.J. We need only trouble you on the point as to section 104.]

The procedure whereby a farmer may require an opportunity to make representations does not arise until after the Minister is satisfied as to the conditions entitling him to make an order under section 12 or section 17. The hearing of the representations is very far removed from judicial proceedings and is merely an executive act in the course of the exercise by the Minister of agricultural discipline, in order that he may inform himself of any factor that might have been missed which the farmer concerned might put before him. The Minister cannot in practice hear the representations himself, and under the Act he can appoint someone to listen to them for him—to act, so to speak, as an ear-trumpet. The particular form of procedure laid down in the Act is merely machinery for informing the Minister and it is parallel to that in *Franklin* v. *Minister of Town and Country Planning*,[4] where the absence of any obligation to consider was indicated by the fact that nothing in favour of making the order was to be put to the person hearing. If the power to make supervision orders can be delegated to a committee, then it might well be that the best person to hear the farmer's representations is that body. The representations may be made direct to the Minister in writing. There is no reason why, under this form of legislation, an independent person must be appointed.

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[3] Ante, p. 141.

"No" in section 104 (5) is adjectival and means "not any." The effect of the following "or" is to break off the negative and the correct word to have used would have been "nor": see Fowler's Modern English Usage, p. 408. As a matter of grammatical necessity, therefore, a second "of" must be added so that the subsection should read "No officer or servant of a county "agricultural executive committee, or *of* any sub-committee "thereof, shall be appointed . . ." Any other construction would mean that an officer or servant of an executive committee could not hear representations but an officer or servant of a sub-committee could. An executive committee are not disqualified by the subsection; there is, therefore, no object in excluding a sub-committee.

By the Interpretation Act, 1889, "person" includes "per-"sons," so that a body of persons may be appointed. Section 104 (4) merely picks out the operative provisions of the statute whereby the Minister is to provide an opportunity of making representations. The appointment of a person is a function which may be delegated in the same manner as other functions, and the delegation to the sub-committee by the executive committee amounts to an appointment.

[LORD GODDARD C.J. It is hardly appropriate for the body which makes the order to hear the representations.]

The hearing is not to be considered as a judicial proceeding, and in a great many cases it is very convenient for the same sub-committee to hear the representations. An order under section 17 is not made by a delegate but by the Minister himself.

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[4] [1948] A.C. 87; 63 T.L.R. 446; [1947] 2 All E.R. 289.

[DEVLIN J. Can the Minister appoint himself to hear the representations, and, if not, can he empower his delegates to appoint themselves?]

The Minister can appoint anyone except himself. The administrative functions of hearing the representations passed to the sub-committee, but the committee itself made the appointment.

Section 12 makes no provision for the occupier to have the matter considered by a judicial tribunal, whereas section 17, which is concerned with dispossession, expressly provides for a reference to a tribunal. That difference is relied on as showing that the person who hears the representations is not to form any view on them but must make the substance of them available to the person making the order.

[CASSELS J. Does not the wording of subsection (5) of section 104, in particular the last words, presuppose an independent stranger?]

That subsection indicates that the Minister can appoint a body. The geographical objection would apply to both the executive and the sub-committee equally.

J. P. Widgery for the tribunal.

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LORD GODDARD C.J. In this case Mr. Diplock has moved for an order of certiorari directed to the Minister of Agriculture, and to the Land Tribunal for the South Western Province, to bring up and quash an order dispossessing the applicant of a farm situated near Constantine in the county of Cornwall. The order was made under the provisions of the Agriculture Act, 1947, and although it is necessary that I should refer briefly to one or two sections of the Act, in order that this judgment should be understood, it seems to me that the point to be decided is eminently a short one and that the decision on one point will decide the whole case.

Under section 12, the Minister of Agriculture has the right to make a supervision order in respect of a farm. By the supervision order the farmer is, to use an expression commonly used in other branches of the law, put on probation, and somebody is appointed to see that he farms in a proper way. But before the Minister can make a supervision order he must afford "to "the owner or occupier, as the case may be, an opportunity of "making representations to the Minister, whether in writing or "on being heard by a person appointed by the Minister," so that he may endeavour to persuade the Minister not to make a supervision order. Then by section 17: "(1) Where a super-"vision order is in force in relation to the farming of an agricul-"tural unit, and the Minister is satisfied that the farming thereof "does not while the order is in force show satisfactory improve-"ment, then subject to the provisions of this section," a dispossession order can be made. But section 17 (2) provides that he shall not make an order under section 17 (1) "until, after "affording to the occupier and, in the case of a proposal to make "an order under paragraph (*a*) thereof, to the owner of the land to "which the proposed order is to relate an opportunity of making "representations to the Minister, whether in writing or on being "heard by a person appointed by the Minister." It is exactly the same provision as that in section 12. Then, if the Minister goes to the length of making a dispossession order, the matter can be referred to the Land Tribunal. The Land Tribunal is a new tribunal set up under this Act which hears the whole case as an independent body; it is staffed in the way set out in the Act and its procedure is regulated by Order in Council.

Section 104 makes provision as to the representations which can be made. [His Lordship read section 104 (1), (4) and (5) and continued:] Other provisions in the Act (section 72) provide for delegation by the Minister of his powers to county agricultural executive committees and, no doubt, in practice and common sense, nearly everywhere in the Act for the words "the Minister" one can read "county agricultural executive committee." The county agricultural executive committee, in turn, can also delegate to a husbandry sub-committee and, so far as I understand, a sub-committee, having had these matters delegated to them, is really the county agricultural committee. One of the things which the Minister has purported to delegate to the county agricultural committee is the power of receiving representations under section 104, and one of the functions which the county agricultural committee has delegated to the sub-committees is the duty of hearing these representations. The first question that arises in the present case, and the question which is quite sufficient to decide it, is whether the sub-committee is the proper body under the Act to receive these representations.

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The applicant was told that he could make representations to the sub-committee and he attended by a solicitor and did make representations to them. The sub-committee decided to recommend the Minister to make a dispossession order, and when that decision of the sub-committee or of the Minister, whatever you like to call it, was taken before the Land Tribunal, the Land Tribunal upheld it.

A great many points were taken by Mr. Diplock on behalf of the applicant, but I need not go into any of them except the last, because that is enough to dispose of this case; and as we are going to say that these proceedings fail at the outset, it is unnecessary to go into the other matters because any remarks we might make would all be obiter. I think that I am speaking for the other members of the court when I say that we are satisfied that there is nothing in Mr. Diplock's points—urged with skill and pertinacity—except the last, which is an extremely important point, and for my part I decide the matter entirely upon a question of construction.

The point is whether or not the sub-committee is authorized by the Act to be the body to receive representations. I will read the section [104 (5)] again: "No officer or servant of a county "agricultural executive committee, or any sub-committee or "district committee thereof, shall be appointed under the last "foregoing subsection to receive representations relating to land "in the area of the committee."

I cannot believe that if the parliamentary draftsman had meant that it was only the officers or servants of a sub-committee as well as of an agricultural committee who were debarred from hearing these representations he would not have put in the word "of" before the words "any sub-committee." He has not. I listened with interest, though I will not say with understanding, to an argument addressed to us by the Solicitor-General which was supported by some quotations from "Modern English "Usage" by Dr. H. W. Fowler. I know the sort of common modern English which a farmer uses, and having read these quotations I am quite certain that no farmer would understand what that great grammarian was writing about. I think any farmer reading this section—or any person, even a lawyer—would say that it was obvious that what is meant here, is that officers and servants of the county agricultural committee are barred and so are sub-committees, and I have no difficulty in reading it in that way when I see the word "thereof." I think that the section obviously reads in this way: "No officer or "servant of a county agricultural executive committee or any "sub-committee or district committee of a county agricultural "executive committee." The reason why the parliamentary draftsman has put it in the way in which he has is because by the use of the word "committee" in the sentence, "no officer or "servant . . . or any . . . ," he is barring all those four bodies and saying they shall not be appointed under the last foregoing subsection to receive representations. A consideration of subsection (4) shows the reason. The people who were going to make the order which can be appealed to the Land Tribunal are a sub-committee and, therefore, the section is saying: "You are not "to tell the farmer that he is to make his representations to the "sub-committee, the sub-committee being the people who are "really to decide whether or not the supervision order or the "dispossession order is to be made." There would be no sense in that and the farmer would say: "What is the good of my "going before these people who have already decided that they "are going to make this dispossession order? If I go before some "independent person I may be able to satisfy him that he ought "not to make the order and he will tell them so." That seems to me to be what the statute is contemplating. I think that the plain reading of subsection (5) of the section is clear; it is that sub-committees and district committees of the executive committee are not to be appointed to receive representations. I dare say that it has been done all over England, because these delegations, I suppose, are all arranged from headquarters and committees and sub-committees are told what they are to do. As Devlin J. pointed out, if the Solicitor-General's argument is sound, the Minister could himself receive the representations. I do not think that that is intended at all. I think that what is intended is that some person, whom the Minister has to appoint, is to receive the representations so that the farmer can open up his soul and his grievances to him and try to persuade him to tell the Minister or the committee that they ought not to make the order. I think that that is the commonsense view of the machinery provided by the Act and that on the clear words of subsection (5) the sub-committee cannot be the persons to receive the representations. In the present case the sub-committee did receive the representations and, therefore, these proceedings have been bad ab initio.

There is no reflection on the Land Tribunal; they had put before them a case and they heard that case. The point whether or not the preliminary proceedings were in order was

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not before them at all. The order must go and the proceedings must be brought up and quashed.

CASSELS J. I agree. I think that the important words of subsection (5) of section 104 of the Act are to be found at the end, namely, " to receive representations relating to land in the " area of the committee." I think that the sub-committee, the district committee, the county agricultural executive committee, their officers and their servants are so far excluded as regards the receiving of representations from the person who is chiefly concerned, namely, the farmer himself. For these reasons I agree with what my Lord has said.

DEVLIN J. I agree with the judgment which my Lords propose and also with the reasons which they have given for it. I should be prepared, if necessary, to decide this case on the construction of subsection (5) of section 104 because, although I have not, after hearing the Solicitor-General upon it, found the question of construction altogether easy, I think that the construction which my Lords have put upon it is on the whole the right one. I also decide the case, and I prefer to put this as my main ground, on the effect of subsection (4) of section 104.

Subsection (4) is the provision which requires that a person aggrieved shall, if he wants it, be afforded an opportunity " of " being heard by a person appointed by the Minister for the " purpose."

In the present case the Minister, in effect, appointed for the earlier purposes of the Act, that is, for discharging the administrative function of satisfying himself that it was a desirable case for a dispossession order, the husbandry sub-committee of the agricultural executive committee. I say in effect appointed them, but that is not quite right; what he had done was to delegate all his powers to the county agricultural executive committee and the county agricultural executive committee passed them on to the husbandry sub-committee, and it was, therefore, the husbandry sub-committee who acted in all the initial stages. The Minister appointed, for the purpose of hearing the representations, that same husbandry committee which had previously acted. In my judgment, there is no power so to do under the section. The Minister could not appoint himself to hear the representations. He, therefore, cannot appoint an alter ego to discharge all his administrative functions and then say to that alter ego: "Now you can do "what I could not do myself; you can hear the representa- "tions I could not hear." The section must be construed to mean that if he delegates all his functions he cannot appoint that functionary to hear the representations. I should have been prepared to arrive at that conclusion, though it is not necessary that I should express a definite opinion on this, merely from the words "be afforded to him of being heard "by a person appointed by the Minister for the purpose." I think that means that he must appoint a person for the purpose of hearing the representations and that he may not appoint someone who has already acted in the matter for some other purpose. I think that is probably the right construction of the section, but it is not necessary for the purposes of this case that I should go as far as that. It is sufficient to say that just as the Minister cannot appoint himself to hear the representations, so he cannot appoint his own alter ego to whom he has delegated all his functions.

That is how the matter stands upon the literal wording of the Act. The Solicitor-General's argument for giving a different construction to the Act is, I think, really based on this: he says: "This is all mere executive machinery. There is nothing for "the person appointed to do except," as he puts it, "to be an "ear-trumpet to convey representations to the Minister. That "being so, looking at the object of the section, what reason "can there be for not saying that the Minister can appoint "the sub-committee to act as the ear-trumpet; what could "be more convenient administratively than that the sub- "committee which has already had to go into the whole matter "should be appointed also the ear-trumpet to convey the "representations to the Minister?" I am bound to say, without any intention of disrespect to the Solicitor-General or the Minister of Agriculture for whom he appears, that I am sorry to hear that argument advanced because I think that it shows a failure to appreciate the spirit of the Act as well as the letter of it. I do not think that it was intended by this Act that the person appointed should be merely an ear-trumpet to convey representations to the Minister. It is quite plain that if the body appointed is the sub-committee which has already considered the matter, the ear-trumpet would necessarily be partially blocked. I say that without disrespect to the members of the sub-committee, but it is quite impossible if one has already been into a matter and made up one's mind about it, to approach further representations in the same way as one would if one brought an entirely fresh mind to bear.

It is true that the Minister is not obliged to ask for the advice of the person he appoints to consider the representations. I have no doubt that in practice he does so, but he is only bound, I suppose, to receive a report of the representations that are made. But if someone is appointed to hear representations he does not take them down word for word: he selects what he thinks are the significant points to put into a written report to the Minister, and the selection may be done very differently by the man who comes to the matter with a fresh mind than it would be done by those who have necessarily made up their minds about the whole matter. That the spirit of the Act should be observed is important, I think, not only for that purpose but also for giving a sense to the dispossessed farmer that justice is being done and he is being given a hearing. What is the advantage of telling the farmer who has been dispossessed, or is proposed to be dispossessed, by a body of men who live in the locality and who already know probably all that is to be known about the subject-matter of the case in question and who have probably heard unofficially all that the farmer has to say, "If you want to go and make further representations, go and "make them to the same people"? That would give him no real sense of satisfaction. But it would, I hope, give him satisfaction if he heard that an independent person with a fresh mind was going into the matter again. It is true that that independent person might be an official of the Ministry—probably would be—but I think that the experience of most people in this country of the officers of a Ministry who are sent down to hear representations is that they try to come down with an open mind. I think it is the intention of Parliament that they should come down with an open mind and that they should be prepared to make recommendations to the Minister, if necessary, which may not be the recommendations he has received from some other department of the Ministry.

For those reasons I think that subsection (4) is, if I may so put it, a real live section which is intended to confer something of value upon the farmer and is not merely just a bit of executive machinery for repeating through an ear-trumpet observations which have already been made by a more natural means of communication.

I think that it is only right that I should say this—indeed, I think that my Lord has already said it—that there is of course an additional protection afforded by this Act to the farmer and he has had in this case the full benefit of it. That protection is a hearing before the Agricultural Land Tribunal. There is nothing to suggest that they did not act in the matter properly and justly and it may very well be that no sort of injustice has occurred in this case. But if the Act provides the farmer with two safeguards, as I think it does, he is entitled to have both of them, and it is irrelevant to say in this particular case, if he has been deprived of one, that the other may have operated satisfactorily. I agree, therefore, with the judgment proposed by my Lord.

Lord Goddard C.J. Does this case govern the next one?

Kenneth Diplock Q.C. Yes; it necessarily must.

Sir Harry Hylton-Foster Q.C., S.-G. Yes.

Lord Goddard C.J. Then the order of certiorari also goes in the case of *Regina* v. *Minister of Agriculture and Fisheries, Ex parte Graham.*

Orders of certiorari.

J. F. L.

The Minister appealed in both cases.

Sir R. Manningham-Buller Q.C., A.-G., Sir H. Hylton-Foster Q.C., S.-G. and *B. S. Wingate-Saul* for the Minister and the Agricultural Land Tribunal. The cases are of importance because, if the decision of the Divisional Court is right, the practice followed in a large number of cases is wrong and a number of people have not been given the rights which were accorded to them by the Agriculture Act, 1947. The substantial point in each case is whether the farmer was given an opportunity of making representations against the order under sections 12 and 17 proposed to be made against him. The Act says that the representations are to be made to the Minister, and they may be made orally or in writing. It is clear that if they are made in writing they must be made to the Minister, who has the power to make the order. Then come the words "or on being heard by a person "appointed by the Minister." Those words were inserted to

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prevent the Minister from being inundated with applications to hear representations personally, but there is nothing in the section to prevent the Minister from appointing himself to hear the representations. The view expressed in the Divisional Court was that the words "a person appointed by the Minister" meant some entirely independent person, on the ground that there was no point in giving an applicant an opportunity of making representations to a person who had already formed a view on the matter. It is submitted that, on the language of the Act, Parliament intended that if a tenant farmer or owner wished to make representations against a proposal to make an order he should be entitled to make it to the Minister and not be fobbed off with some official of the Ministry entirely ignorant of the matter in question.

The Divisional Court decided the cases solely on the construction which they put on section 104 (5) of the Act of 1947, which says that: "No officer or servant of a county agricultural committee, or any sub-committee or district committee thereof, shall be appointed . . . to receive representations relating to land in the area of the committee." The Divisional Court construed that as excluding any sub-committee or district committee from being appointed to hear representations. Such a construction is quite wrong and could only be justified if the word were "nor," not "or," before "any sub-committee": see Fowler's Modern English Usage, pp. 379, 406. Further, if the object of the subsection was to exclude sub-committees or district committees of the executive committee from hearing representations, one would have expected to find a reference to those sub-committees before the case of officers or servants was mentioned. The object of the subsection is to prohibit officers or servants of the agricultural executive committee or *of* a sub-committee or *of* a district committee from receiving representations. In the Agriculture (Scotland) Act, 1948 (to which the Divisional Court were not referred), section 80 (5), the corresponding provision to that in section 104 (5), is in the following terms: "No officer or servant of an agricultural executive committee or of any sub-committee thereof shall be appointed . . ." There the insertion of the word "of" before the words "any sub-committee" makes the meaning exactly that contended for in the present case. The intent and effect of section 104 (5) was to disqualify officers and servants of sub-committees generally and not to produce the illogical result of disqualifying officers and servants of the agricultural committee but not those of sub-committees. The decision of the Divisional Court on the point of construction was wrong and the appeal in both cases should be allowed.

Kenneth Diplock Q.C. and *J. R. Cumming-Bruce* for the respondent Graham. On the question of the construction of section 104 (5) the Divisional Court were right, and the hearing of the representations by the husbandry sub-committee was ultra vires as contrary to the express provisions of the subsection. A person appointed by the Minister for the purpose of hearing representations must mean someone other than the Minister himself. He cannot hear the representations and, that being so, the sub-committee, who are his delegates, are also excluded from doing so. The construction put on section 104 (5) for the Minister involves leaving out the comma after the words "agricultural "executive committee," and reading the subsection as if the language was the same as that of section 80 (5) of the Agriculture (Scotland) Act, 1948, which was passed shortly after the English Act. Parliament showed in the Scottish Act that when it desired not to exclude sub-committees, but only officers and servants of those bodies, it knew perfectly well the proper language to employ.

[UPJOHN J. Is the Scottish Act relevant to the construction of the English Act?]

It is permissible to look at the Scottish Act, in regard to matters which are in pari materia, in order to see what words Parliament has used to express its intention.

To summarize the contentions on the question of construction, it is submitted, (1) that section 104 (5) expressly excludes any district or sub-committee from hearing representations, and (2) that the words "person appointed by the Minister" must refer to someone other than the Minister himself or his delegate.

The point on the construction of section 104 (5) affects the cases of both respondents, but in the case of Graham there is a second point based on the particular facts of the case. It arises in this way: at the hearing of representations by the husbandry sub-committee, Stroh, the land agent of the executive committee, was present, sat next to the chairman and took part in the discussions which occurred. It is submitted that on any view of section 104 (5) that was wrong, since as a servant of the executive committee he was a person prohibited from being appointed as a person to hear representations. One of his functions at the meeting was to record the decisions of the sub-committee, from which it may be inferred that any written report which would be submitted to the executive committee would be drafted by him. Proceedings before the husbandry sub-committee were for the purpose of hearing representations, and if Stroh was there, either to hear the representations or to prepare a report, it is submitted that it was a breach of the Act.

A. P. Marshall Q.C., *Gilbert Dare* and *Jeremy Thorpe* for the respondent Benney. A strictly grammatical construction of section 104 (5) of the Agriculture Act, 1947, is relied on. The fact that a distinguished grammarian like Dr. Fowler says that a sentence is not grammatical does not give the words a different meaning from that which they ordinarily bear. In *Vacher & Sons Ld.* v. *London Society of Compositors* [1] it is said that it is the universal rule in construing statutes that the grammatical and ordinary sense of words should be adhered to unless that would lead to some inconsistency with the rest of the enactment. The words of section 104 (5) have the clear grammatical meaning which was given to them by the Divisional Court. Further, the Act deals to a large extent with the deprivation of private rights, and in such a case where there are two equally possible constructions the rule is quite clear that it must be construed in favour of the persons whose rights are sought to be affected.

When the whole purpose of the Act is considered, it appears that "person" in section 104 (5) is meant to be used in the singular. The only argument against that view is to be found in the Interpretation Act, 1889, which provides that the singular shall include the plural unless a contrary intention appears. The phrase "a person appointed by the Minister" means that a named person or several named persons shall be appointed so that there will be some certainty about the personality of the appointee. If a committee appointed consisted of five persons, and they were divided in their view by three to two, how is their decision to be presented to the Minister? A committee is not a body unincorporated within the meaning of section 17 of the Interpretation Act and is consequently not a "person." It has been suggested that the Minister can appoint himself to hear representations, but if that be so and he is asked to receive representations in person, he would be undertaking an impossible task. If, as is submitted, he cannot appoint himself to hear representations, equally he cannot appoint his delegate to do so.

In Benney's case there is a second point which was not considered by the Divisional Court in view of the construction which they put on section 104 (5). The point is that whereas the land tribunal, owing to a mistake on the plan which they had before them, was only concerned with 151 acres of land, the Minister made an order in respect of 155 odd acres of which the farm really consisted. Under the statute the Minister is bound to act in accordance with the finding of the tribunal, and the fact that he went beyond that finding in the extent of the area covered by the dispossession order invalidates the order.

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[1] [1913] A.C. 107, 117.

Sir R. Manningham-Buller Q.C., A.-G. in reply. In regard to the new points argued; there could be no objection in Graham's case to the presence of the land agent, Stroh, when the representations were heard by the husbandry sub-committee. There is nothing in the Act which says that representations must be heard in camera or that persons may not be present to listen to what is said as distinguished from those appointed to hear the representations. The land agent was in the position of a magistrates' clerk and the members of the sub-committee were entitled to receive advice from their servant when a question was raised as to their right to hear the representations. The fact that he sat next to the chairman is not enough to suggest that justice was not being done or that it did not so appear, and nothing took place at the hearing, or in the recording of the decision reached, which invalidated the finding of the sub-committee. Throughout the country these sub-committees have made use of the services of their clerk or servant to draw up their report, and there is much to be said for such an official being present to hear what was actually said. It is an astonishing proposition that because Stroh was present, and heard the representations, that constituted a breach of the provision in the Act that he was not a person who could be appointed to receive them.

With regard to the additional point in Benney's case, it is submitted that at least so far as 151 acres were concerned the Minister's order was a good one and not open to challenge.

Cur. adv. vult.

March 17. The following judgments were read.

DENNING L.J. The applicant Graham is a farmer in the county of Durham. On January 22, 1954, the Minister of Agriculture made a supervision order against him. He now comes to the Queen's courts asking that this order may be quashed.

In order to understand his complaint, it is necessary to know the grades in the agricultural hierarchy. At the top there is the Minister of Agriculture himself, who is given by the statute power to make supervision orders against farmers. The Minister is, however, authorized by the statute to delegate his power to the county agricultural executive committees, and he has done so. The county committee is, in turn, authorized by the statute to delegate the power to a sub-committee, and they have done so. They have delegated it to the husbandry sub-committee, and they have appointed that sub-committee to be a person to hear any representations that the farmer may wish to make. Notwithstanding this extensive delegation, the Minister has reserved to himself the power to make a supervision order. So has the county committee.

These committees are all composed of local people who give their services for nothing. The county committee has 12 members, all appointed by the Minister, but seven are specially nominated to represent various interests. Three represent farmers, two represent owners and two represent workers. The sub-committees are composed of members of the county committee, but the county committee can add outside people to them. The committees have their secretaries and clerks who are all civil servants. They are paid officers and servants of the Ministry of Agriculture who are specially attached to the committees for the purpose of helping them with their work, but they do other work for the Ministry as well. The one who was particularly concerned with Graham's case was one Stroh, who is the land agent of the Durham County Agricultural Executive Committee.

[His Lordship stated the facts leading up to the making of the supervision order in *Graham's* case, and continued:] A supervision order is, in essence, a disciplinary measure rather than a judicial sentence. The statute says that if a farmer is not fulfilling his responsibilities to farm the land in accordance with the rules of good husbandry, then the Minister or his delegate can make a supervision order against him. The object of the order is, not to turn the farmer out, but to get him to farm his land properly; and to do this, it puts him under supervision. The effect of it is that the officials of the Ministry can enter the land at all reasonable times to see how it is being farmed, and directions can be given to the farmer requiring him to do whatever is necessary to good husbandry. If he gets it into good shape, all well and good; but if he does not, he is subject to discipline. If he does not comply with the directions he can be taken before the magistrates, who may fine him up to £100. If the farming does not show satisfactory improvement

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whilst the supervision order is in force, he is liable to be turned out. If it gets to the point of dispossession, the farmer has a right of appeal to the agricultural land tribunal, but he has no appeal from a supervision order. The reason is, I suppose, that a supervision order is not regarded by Parliament as being in itself a serious matter. The only right given to the farmer is that he must be given an opportunity to be heard before the order is made against him and before any directions are given. We are concerned here with this safeguard.

The important question in this case is whether the husbandry sub-committees are proper persons to hear the farmer's representations at all. They have heard them for the last six years all over the country, but the Divisional Court has held that they must not hear them at all. There are five points put forward in favour of this view. The first point is this. The Divisional Court held that the sub-committee were prohibited by section 104 (5) of the Act, which says that "No officer or servant of a county agricultural executive committee, or any sub-committee or district committee thereof, shall be appointed . . . to receive representations relating to land in the area of the committee."

The Divisional Court said that this subsection was to be read as if it said that no sub-committee or district committee should be appointed to receive representations. I cannot agree. I think that the subsection should be read as if the word "of" were inserted before "any." The subsection means that "No officer or servant of a county agricultural executive committee, or (of) any sub-committee or district committee thereof, shall be appointed to receive representations."

My reasons are as follows. (1) It is quite common to leave out the word "of" in such a sentence. Parker L.J. gave a homely illustration in the course of the argument: "No eggs of hens or ducks shall be eaten for breakfast." I gave another, not so homely, but nearer to this case: "No officer or servant of a holding company, or any subsidiary company thereof, shall be eligible for a pension." The meaning of those sentences is quite plain. It is the same as if "of" were inserted. (2) In order to get the meaning attributed by the Divisional Court, there would have to be a negative before the word "sub-committee." The subsection would have to run thus: "No officer or servant of a county agricultural committee *and no* (or *nor any*) sub-committee or district committee thereof, shall be appointed to receive representations." There is no such negative in this case. (3) The view of the Divisional Court would lead to absurd results. It would mean that an officer or servant of a sub-committee could be appointed to hear representations but that an officer or servant of the county agricultural executive committee could not be appointed. There is no sense in such a difference. (4) The corresponding section of the Agriculture (Scotland) Act. 1948—section 80 (5)—includes the word "of." It cannot be supposed that the legislature intended that there should be a difference in this respect on either side of the border. The more likely explanation is that the draftsman of the Scottish Act noticed the loose wording of the English Act and inserted the word "of" so as to give the sentence the nice precision which Scotsmen expect.

The second point on which the Divisional Court relied was that they thought that the Minister could not hear the representations himself, even if he wished to do so, but must appoint some other person for the purpose. It followed, therefore, that his delegate, the husbandry sub-committee, also could not hear the representations. I do not agree with the premise. I think that the Minister can hear the representations himself. It is important to notice that throughout the Act the representations are to be made "to the Minister." No matter whether they are made in writing or orally, they are representations "to the "Minister." There is a very good reason for this. The Minister is the person who has to take action, and he has to consider the representations before he does so. It is specifically enacted that he is not to take action "until he has considered" the representations.

In these circumstances it cannot have been intended by Parliament that the Minister should not be at liberty to appoint himself to hear the representations. Looking at it from the Minister's point of view, it is obviously much more satisfactory for him to hear the representations at first-hand himself, rather than at second-hand through an intermediary, and, looked at from the farmer's point of view, it is plain beyond question that the Minister should be able to hear the representations himself.

The ordinary principles of fair dealing require that a farmer should be able to put his case in his own words before the very man who is to take action against him, rather than that he should have to put it before an intermediary, who in passing it on may miss out something in his favour or give undue emphasis to things that are against him. This is so manifestly just and reasonable that the Minister would, I think, in all cases have been bound to hear the representations himself unless the Act authorized him to appoint someone else. But the Act does authorize it. It authorizes the Minister to appoint "a person" to hear them. This person may be someone else, but there is no reason why it should not be the Minister himself. After all, if someone else hears the representations, it is only a second best. It is no doubt authorized for the sake of convenience. The best thing is for the Minister to hear the representations himself, and he can only do this by appointing himself.

The third point is one taken by Devlin J. He said that, before the hearing, the husbandry sub-committee had already inspected the land and made up their minds that a supervision order should be made. In his view, therefore, it was not right for them afterwards to be appointed to hear the farmer's representations, but an independent person with a fresh mind should be appointed. I cannot agree with this reasoning because I do not think it is correct to say that, on the first inspection, the sub-committee had made up their minds. They, no doubt, formed a provisional view that it was a case where the farmer should be put under supervision, but as fair-minded people they would not make up their minds until they heard what he had to say.

A simple illustration is that of an employer who thinks that his servant is doing his work badly but does not make up his mind to dismiss him or to put him on to other work until he has heard what the servant has to say. That seems to me to be the very sort of thing contemplated by section 12 of this Act. If one inserts into the section the effect of delegation, it reads "when "the husbandry sub-committee is satisfied that the occupier is "not fulfilling his responsibilities to farm in accordance with "the rules of good husbandry, the sub-committee, after affording "to the occupier an opportunity of making representations to the "sub-committee, may by order place the occupier under the "Minister's supervision." So read, it seems to me to contemplate that the sub-committee may take a provisional view, but should not make up their minds until after affording the farmer an opportunity of being heard.

The fourth point is one taken by Mr. Marshall. He said that the "person appointed" to hear representations must be a single person, or at least a number of specified persons, and not a fluctuating body like a sub-committee. I do not think that that is correct. The Interpretation Act, 1889, shows that singular includes plural, and *Davey* v. *Shawcroft*[1] shows that the word

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[1] 64 T.L.R. 289; [1948] 1 All E.R. 827.

"person" may include a sub-committee. The contrary view would lead to extraordinary results. It is quite plain that the husbandry sub-committee have by valid delegation been authorized to *consider* the representations and take action. It would be very strange if they could not also *hear* the representations. In order to consider the representations, they must have the representations before them, and there can be nothing better than for them to hear them themselves.

The fifth point is one taken by Mr. Cumming-Bruce. He said that Stroh, the county land agent, was prohibited by the statute from receiving the representations. It was not right, therefore, for him to sit with the sub-committee to hear them, nor to write its report. I think that is putting the matter too high. The statute is designed to prevent the local officials from themselves hearing the representations as if they were inspectors appointed by the Ministry. But I see no reason why a local official should not attend the hearings of the husbandry sub-committee in the capacity of clerk to the sub-committee. He must act, however, solely as clerk and not as a member of the sub-committee. He must take no part in the decision of the case, because the decision must be the decision of the sub-committee alone, and not the decision of the clerk, nor of the sub-committee and the clerk. His position is very like that of a clerk to magistrates whose position has recently been authoritatively stated by Lord Goddard C.J. in a practice note.[2] The official should sit at a different table and take a note of all that happens; but he should not attend at the deliberations of the sub-committee unless they ask him to do so, as for instance, if they wish to refresh their memory from his note of what was said. They can take his advice regarding practice and procedure but not on the facts, because the decision on the facts is for the sub-committee alone. He can from his note draft the report of the representations which the farmer has made, but it must be approved as correct by the members of the sub-committee before any use is made of it, because it is they who are responsible for it and not the clerk. In the present case the county land agent, Stroh, seems to have fulfilled all these requirements except that he sat at the same table with the sub-committee, and he seems to have been present as a matter of course at the deliberations of the sub-committee. These were irregularities which will, no doubt, be remedied in future, but they do not invalidate the proceedings any more than would similar conduct on the part of a clerk to the magistrates (see *Ex parte How* [3]).

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[2] [1953] 1 W.L.R. 1416.

That disposes of all the points raised against the validity of the supervision order. It means that the practice hitherto adopted throughout the country is valid. The husbandry sub-committee are entitled to hear the representations, to consider them and to take action upon them; and they are entitled to have the county land agent present in the capacity of clerk to the sub-committee.

There is one point, however, which was not raised before us but which I would mention. I notice that in *Graham's* case it was not the husbandry sub-committee who took action. They referred it to the county committee, and it was the county committee who made the supervision order. The county committee could not fairly come to a decision against the farmer without considering all the representations that he had to make. Indeed the statute forbade it. I ask myself, therefore: Did the county committee have all his representations before them? I should have thought that their best course, when the matter was referred to them, would have been to hear the farmer afresh themselves. They could have given him notice of their meeting and invited him to make his representations direct to them. But they did not do this. They decided without hearing him or his representative. They had, however, before them a report of the husbandry sub-committee and, no doubt, at their meeting there were present members of the husbandry sub-committee who would put forward the farmer's representations. In those circumstances I think we must assume that they considered all the farmer's representations; and if so, the order cannot be impugned.

My conclusion is, therefore, that the supervision order was validly made against Graham, and that the appeal of the Crown must be allowed accordingly. I am glad to see, however, that Graham says that he has done much work and spent much money during the past year, and it is to be hoped that he has now attained such a standard of good husbandry that the order may be revoked.

I now turn to *Benney's* case. He is the owner for life of Tucoyse Farm, Constantine, Cornwall. There is a farmhouse, a cottage and 155 acres of land. He is 57 years of age now. He has farmed the land himself for the last 24 years. His father before him farmed it for 48 years, and his grandfather for many years before that. The farmhouse is 72 years old and was built for his father on his marriage. The farm is his sole means of livelihood and he has no other place to live. Yet a dispossession order has been made against him, turning him out of the land of which he is the owner and out of the house where he has lived all his life, with no provision made for alternative accommodation or other work. His only offence, if it is an offence, is that he has not maintained a reasonable standard of production on the holding.

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[3] [1953] 1 W.L.R. 1480; [1953] 2 All E.R. 1562.

It may be said that those facts are not relevant to the cold points of law which have been brought before us, and in a sense this is true. All I say is that if an English farmer is to be turned out of his farm, which he and his family have worked for generations, it should not be done except with the full authority of Parliament and in strict accordance with all the safeguards and provisions laid down by Parliament. [His Lordship stated the facts and continued:] Benney had no right of appeal from the decision of the tribunal to anyone. He had no right of recourse to the Queen's courts on the merits of the case. He was bound to leave his home and his land unless he could find some technicality on which to upset the proceedings. That is why the Queen's courts have of late been asked to consider the technicalities of these cases.

On August 9, 1954, Benney, through his advisers, applied to the High Court to quash the proceedings and gave four main grounds: (1) That the husbandry sub-committee had no jurisdiction to hear the representations which Benney made in opposition to the proposal to dispossess him. This is the same point as that which was raised in *Graham's* case, and it fails for the reasons there given. The husbandry sub-committee have jurisdiction to hear and determine a proposal for dispossession just as they have a proposal for supervision. (2) That the agricultural land tribunal was not properly constituted. This was abandoned because the point has now been decided in *Woollett* v. *Minister of Agriculture and Fisheries*.[4] (3) That a document containing a record of milk sold by Benney was not properly admitted in evidence by the tribunal. This was not pursued before us because the tribunal was entitled to admit it under their rules of procedure. (4) That the tribunal was concerned with only 151 acres whereas the order of the Minister was made in respect of 155 acres, and that the Minister could not, without Benney's consent, increase the area in this way. I think that this last contention is right. The precise area under consideration may often be of much importance. Suppose that the Minister proposes to take a lot of poor land and misses out a small area of good land which is well farmed. The omission might just turn the scale against the farmer, which would be most unjust. Suppose, next, that the tribunal approved a proposal to dispossess him of poor land but leaves him with good land. It would be very wrong if the Minister could afterwards extend the order so as to include the good land. The statute says that the Minister must act in accordance with the report of the tribunal. He is not therefore at liberty to go beyond it.

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[4] [1955] 1 Q.B. 103; [1954] 3 All E.R. 529.

In this case the point is a very technical one because the extra four acres was made up of narrow strips on the edge of the farm and could hardly affect the decision of the tribunal, but, technical though it is, I think that Benney is entitled to take advantage of it. The dispossession order must be quashed.

The Attorney-General suggested that, if the present order is quashed, the Minister could the very next day make a new order for the 151 acres and would, indeed, be bound to make it. I make no comment upon this suggestion except to say that it is now more than a year since the tribunal made its report and during that year Benney may have improved the production of the farm so much that it would be unfair to turn him out. If he has done so, I should be surprised if the Minister was under an overriding compulsion to make a new dispossession order. I should have thought that. after this lapse of time, it was open to the Minister to reconsider the matter.

My conclusion therefore is that in *Benney's* case the proceedings of the husbandry sub-committee and of the tribunal were valid but that the dispossession order made by the Minister was invalid. The appeal of the Crown must therefore be allowed in part and dismissed in part so as to give effect to this conclusion.

PARKER L.J. Three main points fall to be considered in these appeals: (1) Whether section 104 (5) of the Agriculture Act, 1947, on its true construction debars a sub-committee of a county agricultural executive committee from being appointed to hear representations relating to land in the area of that committee; (2) whether apart from this provision the person appointed to hear representations must be someone other than a person to whom the functions of the Minister have been delegated or, as Devlin J. put it, someone other than the alter ego of the

Minister; (3) whether in any event the appointment of a husbandry sub-committee as such is a good appointment of a person to hear representations.

Turning to the first point, section 104 (5) reads as follows: "No officer or servant of a county agricultural executive committee, or any sub-committee or district committee thereof, shall be appointed under the last foregoing subsection to receive representations relating to land in the area of the committee." In my opinion, it is impossible as a matter of English to read this as meaning that no sub-committee or district committee should be appointed to receive representations. The use of the word "any" prevents the negative "No" at the beginning of the sentence being carried through. In order to have this meaning a further negative would be necessary, for example, "and no sub-committee" or "nor any sub-committee . . ." No doubt the matter could have been put beyond doubt by the insertion of the word "of" before "any," but even without it the meaning is, I think, clear. Further, any other view would lead to the absurdity that an officer or servant of a sub-committee or district committee could hear representations, whereas an officer or servant of the county agricultural executive committee could not; and also that whereas a sub-committee or district committee could not, the county agricultural executive committee could, hear representations.

It is to be observed that by paragraph 22 (2) of the Ninth Schedule "The Minister shall attach to County Agricultural Executive Committees and sub-committees thereof and to district committees and agricultural land tribunals such officers and servants of the Ministry as he may with the approval of the Treasury determine to be required for providing the committees and tribunals with the necessary officers and servants." The plain object, as it seems to me, of section 104 (5) is to provide that no paid officers and servants attached to the county agricultural executive committee and to its sub-committees, and to district committees, shall receive representations relating to land in the area of that committee.

We were also referred to section 80 of the corresponding Act for Scotland, the Agriculture (Scotland) Act, 1948, where by subsection (5) it is provided that "No officer or servant of an agricultural executive committee or of any sub-committee thereof shall be appointed to hear representations." For myself, I very much doubt whether it is permissible to construe an English Act by reference to different wording in a Scottish Act. This assistance, however, can be gained, namely, that Parliament, in relation to paragraph 9 of the Eighth Schedule to the Scottish Act, which, except in regard to district committees which do not exist in Scotland, is the same as paragraph 22 (2) of the Ninth Schedule to the English Act, recognized that officers and servants could be attached to sub-committees as well as to executive committees.

In order to decide the second point it is, I think, vital to consider the scheme of the Act. In something like 15 different cases it is provided that before the Minister takes action, the person concerned, be he owner or occupier or landlord or tenant, is to have "an opportunity of making representations to the "Minister, whether in writing or on being heard by a person "appointed by the Minister." Section 104 (1) then provides that wherever in the Act that formula is used it shall be construed as a provision that the Minister shall comply with the requirements set out in the other subsections to that section. Subsection (4) provides, so far as is material, as follows: "If, whether or not "representations are made to the Minister in writing, the said "person within the prescribed time and in the prescribed manner "requires that an opportunity shall be afforded to him of being "heard by a person appointed by the Minister for the purpose, "such an opportunity shall be afforded to him . . . and the "Minister shall not take the action in question until he has "considered any representations made at the hearing." Subsection (5), to which I have already referred, debars certain persons from being appointed to "receive" representations, and by subsection (6) the person concerned is entitled to choose a person "to represent his views to the Minister."

All these provisions, be it observed, are equally applicable whether the action proposed is one initiated by the Minister, for example, supervision orders (section 12) or dispossession orders (section 17), or by someone else, for example, an application by landlord or tenant (section 19).

It seems to me perfectly clear from the wording of these provisions that the representations, whether oral or in writing, are representations to the Minister. Reference to section 74 (2) and (5) emphasize this, if emphasis be needed. In other words, the scheme of the Act, before delegation takes place, is that the person who is proposing action, the Minister, is the very person to whom representations can be made. In this respect the scheme differs from what is often found in current legislation, where, before action, a Minister has to appoint some person to hear objections or to conduct an inquiry and to report to him. In such a case it is provided that before taking final action the Minister shall consider that report. Section 84 of the Act in question affords an illustration of that type. Under the scheme now under consideration, however, there is no inquiry or hearing in the ordinary sense of the word, nor is any report interposed between the proposal of action and final action. The Minister, who is considering taking action, and who, therefore, has already gone into the matter, and feels that a prima facie case for action is made out, is not to decide on final action until he has considered any representations made to him.

Viewed in this light, it becomes clear that the appointment of a person to hear the representations is for the protection of the Minister and not for the benefit of the objector. The latter would, no doubt, prefer that the Minister proposing to take action should hear the representations at first hand. The Minister, on the other hand, desires protection against demands that he shall personally hear all representations. In these circumstances I can see nothing wrong in the Minister, if he so chooses, appointing himself to hear the representations, or, what comes to the same thing, waiving the provision inserted for his protection and hearing the representations himself.

So far I have been considering the matter apart from delegation which derives its authority from sections 72 and 73. It is unnecessary to refer to these sections in detail. By the Agriculture (Delegation to County Agricultural Executive Committees) Regulations, 1948 (S.I. 1948, No. 187), the Minister, while reserving power in himself to act if he chooses, delegates to the executive committees, so far as is material to these two appeals, all his functions in regard to supervision orders and also in regard to dispossession orders other than the making of the dispossession order itself. He also delegated the power to appoint persons to hear representations. By resolution both executive committees concerned, while in turn reserving rights in themselves to act, should they choose to do so, with the approval of the Minister, delegated certain functions to their husbandry sub-committee. These again included the functions in regard to supervision orders and dispossession orders in so far as such functions had been delegated to the executive committees, and they went on to appoint the husbandry sub-committees to hear representations.

In the ordinary way, therefore, a sub-committee would perform all the functions itself, except the making of the final dispossession order, which would be done by the Minister. In such a case they would not only consider any representations but actually hear them. They would consider them as delegates of the Minister, and hear them either as appointed persons or by waiving the protection afforded to the Minister, which had become quite unnecessary in their case.

The third main point only arises in a case where, as in *Graham's* case, the husbandry sub-committee, after hearing the representations, refer the consideration thereof and action, if any, to the executive committee. In such a case they can only hear and pass on the representations as an appointed person. In those circumstances, it is urged that even if the sub-committee is not prohibited by section 104 (5) from receiving the representations, yet it is not a "person" who can be appointed in the context in which that word is used. There is much to be said for this contention, bearing in mind that in such a case the "person" is in general a mere rapporteur and that it is imperative that the representation should reach the other person who is going to take action in an accurate form. Even so, there is nothing impossible in two or more persons performing that task, and even if a clerk assists and takes the representation down in a written report, the responsibility for its accuracy remains theirs. Accordingly, I see nothing in the context which compels me to depart from the general principle that the singular includes the plural. (See section 1 of the Interpretation Act, 1889.)

Finally, it is said that if two or more persons are to be appointed, they must be appointed by name and that it is not a good appointment merely to appoint a sub-committee as such, a body which fixes its own quorum and all of whom, as in *Graham's* case, may not attend. Speaking for myself, this argument should not, I think, succeed. Assuming the sub-committee to consist of eight persons, and that five constitutes a quorum, I can see no reason why the appointment should not take the form of any five of eight named persons forming the sub-committee, and, that being so, why the sub-committee should not be appointed as such. It would be an odd result if the delegation to a sub-committee as such of the Minister's powers to take action were valid, and yet that its appointment to hear representations was invalid.

So far I have been dealing with points common to both appeals, and I will now deal with certain further points peculiar to the individual cases.

In *Benney's* case the supervision order was made on December 31, 1951. It was made in respect of the unit, that is the

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agricultural unit, known as Tucoyse Farm. Pursuant to section 12 (6) it was registered as a land charge and, ignoring decimal points, the unit was, so we are told, described as 151 acres. When the matter ultimately came before the land tribunal, a map and schedule were duly delivered, pursuant to S.I. 1948, No. 186, which showed the unit again as 151 acres. On March 6, 1954, the land tribunal dismissed the appeal in respect of that unit, and it thereupon became the Minister's duty, pursuant to section 74 (4), to make a dispossession order in respect of that unit of 151 acres. On April 13, 1954, he duly made a dispossession order, but in respect of 155 acres.

What had happened was this. At the hearing before the land tribunal, Benney or his representative pointed out that certain small parcels of land on the boundaries, amounting in all to 3.8 acres, had been omitted from the plan and schedule, and the land tribunal quite rightly, I think, ruled that they could only deal with a proposed dispossession order of the land included in the plan and schedule which alone had been the subject of the supervision order.

In those circumstances the Minister, no doubt thinking that he was relieving Benney of a burden, made the order in respect of 155 acres. However that may be, it is clear that he had no jurisdiction to do so. He was required to act in accordance with the tribunal's report "and not otherwise." I do not think that this court can quash that order merely so far as it relates to the 3.8 acres; it must quash the whole order. Accordingly, on this limited ground I think that an order of certiorari should go to quash the dispossession order. The decision of the land tribunal stands and the appeal should, I think, be allowed in so far as the Divisional Court quashed that decision.

Graham's case was the case of a supervision order. What happened was this. On November 26, 1953, the applicant's farm was inspected by two members of the husbandry sub-committee, accompanied by one Stroh, the land agent of the executive committee. On January 7, 1954, the husbandry sub-committee, consisting of seven out of eight of its members, met to hear the report of the inspection and the representations of Graham, and to decide thereafter whether a supervision order should be made. Stroh attended the meeting and he sat on the left hand of the chairman.

When the representations were heard, Twizell, an estate agent appearing for Graham, took the point that by reason of section 104 (5) the sub-committee could not hear the representations, and Stroh apparently referred to the relevant statutory provisions and took part in the discussion. Ultimately the chairman ruled that the sub-committee had jurisdiction. After considering the representations, however, the sub-committee for some reason or other resolved that the decision whether a supervision order should be made should be referred to the executive committee. This was done and that committee, after considering a report of the sub-committee, made a supervision order.

In those circumstances two further points were taken. (1) It was contended that Stroh, being an officer of the executive committee and therefore a person who could not be appointed to receive representations, in fact sat to hear them, took part in the debate and refuted a representation of law which was put forward. It is, however, important to bear in mind that the Act does not say that the person hearing the representation is to have no assistance, whether in the form of a clerk, shorthand writer or otherwise, or that the hearing is to be in camera. Every person present will in fact hear the representations, but it does not follow that such a person is receiving the representations from the point of view of being responsible for their consideration, or for passing them on to the person who is to consider them.

The evidence is that Stroh was present to record any decision ultimately arrived at and that he did not take part in any way in the deliberations or decision of the sub-committee. Any part he took during the hearing of the representations was taken at the request of the sub-committee who alone were receiving the representations. No doubt it is only right that care should be taken that those putting forward the representations are not misled into thinking that the officer present is receiving the representations in the sense indicated, but I am quite satisfied that Twizell, despite his somewhat cryptic affidavit, fully understood the position. He knew who Stroh was, he knew who the members of the sub-committee were, and he knew that the latter were the persons receiving the representations. In my view this contention fails.

(2) It was also urged that if Stroh was not present to receive the representations, then he must have been present to pass on the representations to the executive committee, and that this is at any rate impliedly contrary to section 104 (5). I am far from satisfied that this point is open to the applicant, and there is no evidence as to whether Stroh in fact made out a written report, or whether the report was even in writing. He certainly was not present at the meeting of the executive committee and it may

well be that the members of the husbandry sub-committee who heard the representations attended that meeting. But even if the point is open, and he did prepare the report, it is not his report; it is the report of the sub-committee who must take full responsibility for it. To say that it will not accurately state the representations made is to assume that the members of the sub-committee are heedless as to their responsibilities, an assumption for which there is no warrant. I would allow the appeal in *Graham's* case.

Upjohn J. I agree with the orders proposed in both these cases and with the reasons given by my Lords, but as we are differing from the Divisional Court, I desire, out of respect for them, to state very briefly my reasons in my own language.

I agree that in section 104 (5) of the Agriculture Act, 1947, the word "of" must be inserted before the word "any." I come to this conclusion on the short ground that paragraph 22 (2) of the Ninth Schedule makes it plain that sub-committees and district committees may have servants as well as county committees; that construction is necessary to avoid manifest absurdity.

Upon the true construction of the relevant sections empowering the Minister or his duly appointed delegates to appoint a person to hear representations I see no ground for supposing that an independent person other than the Minister must be appointed. Outside the statutory prohibition in section 104 the Minister can, in my view, appoint anyone, including himself. However, I prefer the view that if a person has a statutory right to make representations to a Minister, that necessarily implies that the Minister can hear those representations. He is the best person to hear them, for he has to consider them and make the decision, and, in my judgment, it is only if he desires to relieve himself of the burden of hearing the representations that he may appoint a person to do so. I see no reason for the Minister (or delegated body) to go through the formality of appointing himself to hear the representations.

The point that has occasioned me the greatest difficulty in this case is whether, when a person is appointed to hear representations for the Minister to consider, that person may be a committee. A person appointed to hear representations is in general no more than a mere recording instrument, but it may be that the Minister or delegated body who has to consider the representations will want to hear his views as to the truth or sincerity of the representations and in such a case the Minister or delegated body must be entitled to receive the benefit of such views.

This may easily give rise to practical difficulties if a committee is so appointed. For example, if a committee of five are hearing representations they are doing so as a person, and if the Minister or delegated body which has to consider those representations wants to hear the views of the committee, he cannot, so it seems to me, merely consider a majority view. A manifest injustice would be done if a majority of three reported in one sense, leaving the views of their two colleagues, who might have taken a much more favourable view of the representations, unexpressed. Thus, in the absence of complete unanimity, in my judgment all persons who heard the representations must attend the Minister or delegated body who has to consider them, if an expression of their views is required. By section 19 of the Interpretation Act, 1889, "person" includes a body of persons (such, for example, as a committee) unless a contrary intention appears. The question that has exercised my mind is whether this difficulty of operation where a committee is appointed to hear representations is an indication of a sufficient contrary intention within the meaning of that section. On the whole I think not.

Finally, in my judgment, it is essential that the clerk to the committee hearing representations should take no part in the hearing except to record the representations or to give advice in response to the request of the chairman and members of the committee, and it is desirable that by his position in the room he be seen to be only the clerk, though for my part I am not satisfied that Graham or his advisers were misled as to the capacity in which Stroh was present when the husbandry sub-committee heard Graham's representations. In my judgment, the clerk will normally be required to retire with the committee if they are merely a committee to hear and not acting as a delegated body to hear, consider and determine. In the former case the clerk's functions are very different from those of a clerk to the magistrates. Magistrates retire and consider their verdict and return to court to announce it, but a hearing committee is appointed to hear and not to decide. Not only must the committee report the representations fully: there may be two or more views as to the effect of those representations, and they may have to be expressed. If the report is going to be in writing, the clerk is the one to draft it. These busy unpaid gentlemen cannot be expected to undertake that work, though it is their duty to give instructions as to the lines on which the report is to be drafted and then to peruse and alter the draft so that it is their report and not that of the clerk.

These difficulties that I have pointed out arise in practice when a husbandry committee, which normally have delegated to them power to consider and decide as well as to hear representations, feels that the matter is too difficult for them and refer it back to the county agricultural committee. All difficulty is overcome if, in such cases, the county agricultural committee rehear the representations and then consider and decide.

No point was taken by Graham, assuming that, contrary to his contention, the husbandry sub-committee was a properly constituted person to hear representations, that they failed in their duty of reporting the representations to the county committee. It follows that, in my judgment, *Graham's* case was wrongly decided and the Crown's appeal must be allowed.

In *Benney's* case the Minister's order must be quashed only upon the narrow ground that it was a breach of section 74 (4) of the Act, for the Minister included in his order four acres not included in the report of the land tribunal. In my judgment the proceedings in that case were otherwise entirely regular.

First appeal allowed.
Second appeal allowed in part.
Leave to appeal to the House of Lords granted in both cases.

Solicitors: *Solicitor for the Ministry of Agriculture and Fisheries; Gregory, Rowcliffe & Co. for Clayhills, Lucas & Co., Darlington; Lucien Fior for Thrall, Llewellyn & Spooner, Truro; Parker, Garrett & Co. for Michelmores, Exeter.*

P. B. D.

W. YOUNG & SON (WHOLESALE FISH MERCHANTS) LD. *v.* BRITISH TRANSPORT COMMISSION.

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Feb. 21,
22, 23, 24,
25, 28;
Mar. 15.

McNair J.

[1952 W. 3690.]

Railway — Carriage of goods — Owner's risk conditions — Goods not delivered owing to "stoppage or restraint of labour"—"Wilful "misconduct" of company's servants — Goods sold and proceeds tendered to plaintiffs—Company not liable for loss "except upon "proof that the same arose from the wilful misconduct of the "company or their servants" — Company not liable for non-delivery due to "stoppage or restraint of labour" — Whether company liable—Standard Terms and Conditions of Carriage, 1927 *(Conditions "B") (S.R. & O.* 1927, *No.* 1009), *conds.* 3, 14.

The Standard Terms and Conditions of Carriage, 1927 (Conditions "B") ("Owner's Risk") provide by condition 3: "The "company shall not be liable for loss, . . . or detention of or to a "consignment . . . except upon proof that the same arose from "the wilful misconduct of the company or their servants . . ." Condition 14 provides: "Where perishable merchandise:—. . . "(d) Is not delivered in consequence of . . . stoppage or restraint "of labour from whatever cause, whether partial or general; . . . "the merchandise may be sold by the company and payment or "tender of the proceeds . . . shall . . . discharge the company "from all liability. . . ."

The plaintiffs, fish importers in London, imported fish from Denmark, which by contract with the Railway Executive, incorporating the Standard Terms and Conditions, was transported by rail to Bishopsgate and thence by railway van direct to the plaintiffs' premises, thus by-passing Billingsgate. The Billingsgate fish porters, in attempting to assert a claim that all imported fish had to pass through Billingsgate, persuaded the Bishopsgate handling and cartage staff not to handle any imported fish consigned direct to London merchants by threatening to refuse to handle any imported fish at Billingsgate at all. When the Billingsgate men discovered that two consignments of fish had been delivered from Bishopsgate direct to London merchants they ceased to handle any Danish fish. However, under persuasion they called off the ban while attempts were made to secure the end they wanted by other means. There were subsequent threatened stoppages. In September, 1952, two shipments to the plaintiffs arrived at Bishopsgate station. The men there, on the orders of their local departmental committee, refused to send the goods out. Had any attempt been made to deliver them by any other means there would have been a serious stoppage of work. The Railway Executive, taking the view that delivery in accordance with the contract had become impracticable, sold the fish for £54 7s. 10d. net, which they tendered to the plaintiffs. The plaintiffs claimed against the defendants, as successors of the Railway Executive, the full value of the fish, which was agreed at £180:—

Held, that on the facts the action of the Bishopsgate men in refusing to handle the plaintiffs' goods amounted to "wilful "misconduct" within the meaning of condition 3, and their action in carrying out the decision of the local departmental committee amounted to a partial stoppage or restraint of labour within the meaning of condition 14; that condition 3 did not affirmatively impose on the company responsibility for loss arising from the wilful misconduct of their own men; and that, accordingly, the defendants were protected by condition 14 of the Standard Terms and Conditions, and the plaintiffs' claim failed.

Reader v. *South-Eastern and Chatham Railway Co.* (1921) 38 T.L.R. 14 and *H. C. Smith Ld.* v. *Great Western Railway Co.* [1922] 1 A.C. 178; 38 T.L.R. 359 considered.

ACTION.

The following statement of the facts is taken from the judgment of McNair J.: The plaintiffs, W. Young & Son (Wholesale Fish Merchants) Ld., for many years had been engaged in the importation of fish from Denmark. By way of exception from the general practice of fish importers, the plaintiffs habitually by-passed Billingsgate fish market and, in agreement with the railway company and later with the Railway Executive, contracted to have their fish, after transportation by rail from Harwich, the port of importation, to Bishopsgate, delivered direct by the railway vans to their premises at Victoria. Since the importation of fish on private account once more became possible after the removal of the war-time control orders, and the plaintiffs commenced again to operate that method of trade, the Billingsgate fish porters had attempted to assert the claim that all imported fish consigned for sale in the London area should pass through Billingsgate and pay the customary porterage charges or "bobbins" to those porters, or at least pay them porterage charges whether or not the fish physically passed through the market. In pursuance of that claim, the Billingsgate fish porters brought pressure to bear on the handling and cartage staff of the Bishopsgate railway station, threatening that, if they were party to the delivery of any sea fish direct to merchants in London, they (the fish porters) would refuse to handle any imported fish at Billingsgate at all, even though consigned to Billingsgate. To that pressure the Bishopsgate staff succumbed.

The plaintiffs, anxious to maintain their right to carry on their trade in the way which they considered desirable, claimed damages against the British Transport Commission, as successors to the Railway Executive, for their failure to deliver to the plaintiffs at their premises in Victoria a particular parcel of 32 cases of fish and 15 bags of mussels. Those goods had been consigned to the plaintiffs in London by their agents in Denmark from Esbjerg, Denmark, to Harwich under two bills of lading dated September 27, 1952, which contained provisions under which the goods were to be forwarded by rail at owner's risk to Bishopsgate Station. By the long course of dealing between the parties the contractual obligations of the railway authorities covered the delivery of the goods by railway vans direct from Bishopsgate Station to the plaintiffs at Victoria.

The goods in question arrived at Bishopsgate Station, together with large quantities of other fish consigned to Billingsgate, in the early morning of September 29, 1952, but the Bishopsgate handling and cartage staff refused to allow delivery direct to Victoria. The defendants maintained that, if they had attempted, either by the use of other labour (if available) or by firm disciplinary action against their own recalcitrant staff, to force delivery to be made by their own vans to Victoria or to allow the plaintiffs to collect the goods with their own vans at Bishopsgate, a major stoppage would have resulted, involving not only their own staff at Bishopsgate but a refusal by the Billingsgate men to handle any Danish fish arriving by rail. Accordingly, taking the view that delivery in accordance with their contract had become impracticable, they sold the plaintiffs' goods for the net sum (after deduction of expenses and charges) of £54 7s. 10d. That sum they tendered to the plaintiffs. The plaintiffs claimed the full value of the fish, which was agreed to be £180, though their main purpose was to establish their right to claim direct delivery to their premises in Victoria.

The issues to be determined were (1) what the precise circumstances were in which the failure to deliver took place; (2) whether the defendants' "Standard Terms and Conditions"[1] for goods

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[1] Standard Terms and Conditions of Carriage, 1927 (Conditions "B") ("Owner's Risk") (S.R. & O. 1927, No. 1009), cond. 3: "The company "shall not be liable for loss, damage, "deviation, misdelivery, delay or "detention of or to a consignment "or any part thereof, except upon "proof that the same arose from "the wilful misconduct of the com-"pany or their servants. Provided "that nothing in this condition shall "exempt the company from any lia-"bility they might otherwise incur "in the following cases:—(a) Non-"delivery of the whole of a consign-"ment or of any separate package "forming part of a consignment, "properly packed, and addressed in "accordance with condition 1 hereof, "unless such non-delivery is due to "accidents to trains or to fire. . . .

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carried at owner's risk rates (as were the goods in question) contained conditions sufficient to exempt them from liability in the state of affairs which in fact developed; and (3) if so, whether the defendants could by any reasonable course of conduct on their part have avoided the development of that state of affairs so as to disentitle them from relying upon the relevant conditions.

At Billingsgate the Billingsgate porters, who were all members of the Transport and General Workers Union, had, at all material times, secured the acceptance of the closed shop principle and were sufficiently well organized to have brought the work of the market to a stop at any time in support of any claim which they considered to be legitimate. McNair J. found that any attempt to bring in outside labour to handle the fish in that market against their wishes would have involved a general stoppage of work in the market. At Bishopsgate Station all the operatives, other than the administrative and clerical staff, were members of the National Union of Railwaymen. For the purpose of joint negotiation between the union and the railway authorities, a system of local departmental committees had been devised, on paper at least, to provide a recognized means of communication between the employees and the local officials of the railway. In relation to the handling of the imported fish there were set up, on the men's side, two local departmental committees, the one representing the handling staff or "tonnage" staff, i.e., the men who handled the fish from the train, sorted it on the bank and loaded it on the railway vans for dispatch, and the other representing the cartage staff, who were responsible for the delivery of fish in the railway vans to their destination, which was, in the vast majority of cases, Billingsgate

"Provided however that the company "shall not be liable in the said cases "of non-delivery . . . upon proof by "them that the same has not been "caused by the negligence or mis-"conduct of the company or their "servants."

Cond. 14: "Where perishable mer-"chandise:—. . . (d) Is not delivered "in consequence of riots, civil commo-"tions, strikes, lockouts, stoppage or "restraint of labour from whatever "cause, whether partial or general; ". . . the merchandise may be sold "by the company and payment or "tender of the proceeds of any such "sale after deduction of all proper "charges and expenses in relation "thereto shall (without prejudice to "any claim or right which the sender "or consignee may have against the "company otherwise arising under "these conditions) discharge the com-"pany from all liability in respect of "such merchandise or the carriage or "delivery thereof. . . ."

Cond. 16: "The company shall not "in any case be liable for:—. . . "(c) Loss, damage, or delay to the "extent to which the same is caused "by or arises from—. . . (ii) Riots, "civil commotions, strikes, lockouts, "stoppage or restraint of labour from "whatever cause, whether partial or "general; . . ."

market. In any case involving the interests of both the handling staff and the cartage staff, an ad hoc joint local departmental committee, referred to as the Bishopsgate L.D.C., consisting of representatives from the men's side of each of the separate local departmental committees, operated. Though in theory the local departmental committees were joint bodies on which both the official side and the employee side had equal representation, in this particular dispute no joint committee in that sense operated, but throughout the matter was handled on the official side solely by Forster, the goods agent, i.e., the senior official responsible for the goods traffic at the station, and at night by his assistant, Hoppe, and on the men's side by the Bishopsgate L.D.C.

At the end of September, 1949, and shortly after the fish trade was released from control, the Billingsgate Porters Committee (members of the Transport and General Workers Union, Branch L/264) notified the Billingsgate L.D.C. that, in view of the seriousness of Danish fish by-passing Billingsgate Market, the Billingsgate Committee had decided that, as from October 10, "the venue of sale of all consignments of Danish fish for the "London area shall be Billingsgate Market and that all consign-"ments of Danish fish for the London area shall be delivered by "licensed porters who are members of the T.G.W.U. Branch "L/264." In pursuance of that resolution, the Billingsgate men on October 10, 1949, on learning that two consignments of Danish fish for other consignees had been delivered from Bishopsgate direct to London merchants, ceased handling any Danish fish in the market. That cessation of work was short-lived: for apparently, under persuasion, they consented to call off the ban for the time being while attempts were made to secure the end which they had in mind by persuading the shipping company to refuse to accept Danish fish except for consignment to Billingsgate. The plaintiffs, however, meanwhile continued to ship their fish from Denmark as before, consigned to Bishopsgate for direct delivery to their premises. On August 29, 1952, Tavener, as chairman of the Bishopsgate L.D.C., attended a meeting of the Billingsgate men, when he was told that as from a certain date in the near future the Billingsgate men insisted that all Danish sea fish traffic had to pass through Bishopsgate to Billingsgate and that, if this was not strictly adhered to, they would refuse to handle any Danish fish at all. That decision involved two elements: (1) that all fish had to travel by rail and not by road, and (2) that all fish should pass through Billingsgate. The

Billingsgate men justified that claim by the assertion that they had made an arrangement with the Danish Embassy that all Danish fish should be so routed. Tavener then called a full meeting of all the cartage and handling staff, at which it was agreed without dissent that the Bishopsgate men would co-operate with the Billingsgate men to secure that result. His men's main concern was the fear of losing the whole of the Billingsgate traffic, for the time being at least, if the Billingsgate men struck. On August 30, Tavener reported that decision, not as a matter for discussion, but as a fait accompli, to Hoppe, the assistant to Forster, the Bishopsgate goods agent, by whom the men's decision was reported to his immediate superiors, the district goods superintendent and the continental traffic manager at Liverpool Street Station. On September 1, the continental traffic manager, in reply, sent peremptory instructions to Forster that fish accepted by the Railway Executive for conveyance to places other than Billingsgate was not to be delivered to the latter point, adding that "whatever agreement may or may not have "been arrived at between the market and the Danish Embassy "has no force so far as the railway is concerned and the Railway "Executive lays itself open to legal proceedings if it delivers "goods to any point other than the one originally designated by "the sender."

On September 2 Hoppe gave instructions to the chief night clerk responsible for clearing the Danish fish train, that should any difficulty arise from the plaintiffs' traffic, the goods were not to be sent to Billingsgate (that being in accordance with the continental traffic manager's directions), but he added that they should be held on the bank for further instructions. On September 8, when the next consignment of the plaintiffs' fish was due to arrive, a representative of the Billingsgate men, who had apparently heard that another firm, Sudders, were attempting to by-pass Billingsgate, notified Pitcher, the railway representative at the Fish Market Office, that no further Danish fish would be handled there and the Bishopsgate officials were advised by Pitcher to send no further fish to Billingsgate meanwhile. Tavener, hearing of that threatened stoppage of all the Danish traffic, summoned a meeting of his L.D.C. and later called a meeting of his men at Bishopsgate and, on the authority of the L.D.C., instructed his men not to handle the plaintiffs' fish. Those instructions were acted upon by the men, for when the foreman under the chief night clerk gave instructions for the plaintiffs' fish (after it had been sorted) to be loaded on to railway vans for delivery to Victoria, the tonnage men refused. Later in the morning the Billingsgate men, hearing of this refusal and learning that Sudders had agreed to pay their porterage on the fish, although not passing through Billingsgate, were content to call off their strike and to continue to handle Danish fish delivered to the market. McNair J. found that this ban would not have been removed by the Billingsgate men unless they had been satisfied that the plaintiffs' fish was not going to be handled by the Bishopsgate men and that they would get their porterage on Sudders' fish, and that had the railway officials at Bishopsgate there and then attempted to put the disciplinary machinery in force against their men when they were acting in accordance with a decision of their L.D.C., or had attempted to get outside or other labour to shift the goods to Victoria, the whole work of the station would have come to a standstill.

Later that morning, McLeod, the regional staff officer, the official responsible for dealing with labour difficulties throughout the Eastern region, took the initiative in summoning a meeting at the commercial superintendent's office, at which both the official side and the men's side were represented. In an agreed note of that meeting the following account was given: "Mr. Blakey "stated that the meeting had been called in consequence of the "Bishopsgate staff's action in refusing to deliver (or to allow "consignees to take delivery of) Danish fish traffic consisting of "23 cases for Coastal Supplies and 19 cases for Youngs addressed "to High Street, Camden, and Victoria, respectively. The "Executive had obligations in regard to this traffic and he asked "the men to explain their action. The men's representative "referred to trouble which had arisen previously because of "certain merchants by-passing Billingsgate market by consigning "Danish fish direct to their premises. At that time a meeting "was held between the Danish Embassy, the Billingsgate fish "merchants and the Billingsgate fish porters in consequence of "which the Danish Embassy undertook to influence all Danish "fish for London through the Billingsgate market. Until "recently, with the exception of odd consignments, this arrange"ment had been observed and no difficulties had arisen. Refer"ence was made to certain firms such as Line & Lucy and "Macfisheries taking delivery direct but paying the market "porterage, and to this being accepted as within the term of "the agreement. Recently, however, Messrs. Young and Coastal "Supplies, neither of whom were members of the Billingsgate "Fish Merchants' Association, had been developing a traffic "which was not being consigned in accordance with the arrange-"ment. Fish was also being taken by road direct from Parkeston "to traders' premises and odd lots were being sent by train for "which there was no room on the road vehicles.

"An ultimatum had been given by the Billingsgate porters "to the Bishopsgate men that if they continued to deal with "Danish fish for these firms consigned other than through "Billingsgate, they on their part would refuse to deal with any "Danish traffic passing through Bishopsgate. The odd lots of "traffic for the two firms was small in relation to the total "Danish traffic and they felt that they had to co-operate with "the Billingsgate men because of the consequences were the "Billingsgate men to refuse to deal with the thousands of cases "of Danish fish passing to Billingsgate through Bishopsgate. As "evidence that the threat of the Billingsgate men was a real "one, the men's representatives referred to the action taken "by the Billingsgate men that morning in refusing to handle "Bishopsgate traffic because of a third firm, Sudders, attempting "to by-pass Billingsgate. They had changed their attitude later "in the day, but only because the firm had agreed to pay "porterage as if their fish had passed through Billingsgate. The "Executive representatives referred to their obligations as "common carriers and made it clear that they could not condone "or support the action of the men in refusing to handle traffic. "They noted with concern the threat of the Billingsgate porters "and would follow the matter up with the Billingsgate Fish "Merchants' Association and would investigate the facts in "regard to the arrangements with the Danish Embassy to which "reference has been made. After the withdrawal of the men's "representatives it was agreed: (1) Mr. Padgett would find out "from the Danish Embassy whether there is in fact an agree-"ment that all Danish fish should pass through Billingsgate "Market. (2) Mr. Marriott would speak to Mr. Wilson, President "of the Billingsgate Market, to see if he has any knowledge of "the arrangement. (3) Mr. Forster would inform Messrs. Young "that our men will deliver the 19 boxes of fish to the market "if they will pick it up from there, and that there would be a "subsequent discussion as to the further action to be taken to "clear up the situation."

From evidence of a number of experienced railway officials who had had a life-long experience in handling labour disputes McNair J. reached the conclusion that those responsible for giving orders necessary for the proper discharge of the railway authorities' contractual obligations were powerless to do more than they did. Experienced officials on the spot decided that it was not a proper occasion for an immediate trial of strength and they decided to move warily in the hope that further inquiries, particularly as to the existence of the alleged agreement with the Danish Embassy, and the lapse of time, might provide a solution. McNair J. found that that decision was, from the point of view of the railway authorities, right, having regard to the importance of avoiding a widespread stoppage, and that their apparent lenient attitude towards the men on that occasion was in no way influenced by the fact that if the action of the Billingsgate men, in co-operation with the Bishopsgate men, resulted in traffic being brought back from the roads to the railways it would be to the advantage of the railway authorities.

On September 8 the plaintiffs' consignment so held up was sold by the Railway Executive. Without delay, as had been decided at the meeting, the railway officials made the necessary inquiries of the Danish Embassy and the Billingsgate Tenants Association and attempted to invoke the intervention of the Minister of Labour. In his letter of September 15, McLeod accurately stated the dilemma in which the railway officials were and the action which he proposed. He wrote as follows to the regional industrial relations officer of the Ministry of Labour: "You will realize that we are in a difficult position. As common "carriers, we are bound to carry any traffic handed to us for "conveyance and we are liable for breach of contract where "traffic for any reason is undelivered. We cannot condone the "action of the Bishopsgate men and our proper step is to take "disciplinary action against any man who refuses to handle "traffic. If we do so, it is probable that it would result in a "major stoppage of work at Bishopsgate. If, on the other hand, "we were to prevail upon our staff to deliver the traffic from "Bishopsgate to traders' premises, then I think it is clear that "the Billingsgate staff would refuse to handle any Danish fish "passing through Bishopsgate. It has occurred to me that, "before precipitating action in either of these directions, it "would be well to have the question explored at a meeting "attended by the Billingsgate Tenants Association, the Billingsgate Fish Porters, the Railway Executive and representatives "of the Bishopsgate staff. If we were to call such a meeting, I "feel that the various parties concerned would merely be liable "to table their opinions and that we would not get much further "forward. It seems to me, therefore, to be very desirable that "the meeting should be called either by the Ministry of Labour "or by the Ministry of Agriculture and Fisheries, and that both "the Ministries should be represented. The matter is urgent to "the extent that further lots of traffic for Coastal Supplies or "Messrs. Young may arrive any day, and I should be very "grateful if you would let me have your comments. I would not "have troubled you in this way with a local problem, but in this "case I feel that we are having to bear the brunt of a dispute "between other parties." No reply was received to this approach until September 26, when McLeod was informed as follows: "Mr. Bolton, Ministry of Labour, rang up to say they had "consulted their headquarters, but that the view was taken it "would not be appropriate for the Ministry to intervene in this "dispute at this stage. They were fully appreciative of the "difficulties, but the Ministry, as a matter of policy, preferred "to hold themselves 'in reserve' and only to be brought into "the picture if negotiations at the lower level failed and it was "thought they could assist in finding a solution. They therefore "suggested that perhaps the best course might be for a meeting "of the interested parties to be held with a view to seeing what "was the outcome. I said"—that was McLeod—"I did not "think any such arrangement would go far in resolving the "problem and that we were disappointed that the Ministry of "Labour had not seen their way to fall in with the suggestion "which was made." Meanwhile, on September 22, a further consignment of the plaintiffs' fish slipped through apparently by accident without evoking any reaction from the Bishopsgate men or from Billingsgate.

On September 25 the plaintiffs instructed their Danish agents to "continue sending at our risk so that we can establish our "rights." On September 27 the two shipments in question were despatched from Denmark, arriving at Bishopsgate Station in the early morning of September 29. The night foreman gave instructions to the "tonnage men" to load it on to railway vans, but the men refused to touch it. The foreman reported to the chief night clerk, who, in order to clear the bank for incoming traffic, managed to get it loaded on to a van by some "time" men, i.e., men not part of the handling staff; but he told the cartage department not to attempt to send the van out, as he was certain that if any such attempt had been made there would be a serious stoppage possibly of the whole station and affecting a train of continental fruit shortly due to arrive. McNair J. found that he formed a correct judgment of the situation.

The matter then passed into the hands of the continental traffic manager, Neil, or his representative, Padgett. Telephone discussions took place between Padgett and Phillips and later Young, on behalf of the plaintiffs, with a view to removing the deadlock. The plaintiffs were informed that delivery to Victoria by railway vans was, in the circumstances, impracticable—as indeed it was—and two suggestions were canvassed: first, that delivery should be made to the Railway Office at Billingsgate, leaving it to the plaintiffs to collect there with their own vans and labour, and, secondly, that the plaintiffs should collect with their own vans and labour from Bishopsgate Station. McNair J. found that, if attempts had been made to carry out either of those suggestions, there would have been a major stoppage both at Bishopsgate and Billingsgate. In the result, no further attempt was made to effect delivery, and the plaintiffs' fish was sold by the defendants without the authority of the plaintiffs. On sale it realized the sum of £54 7s. 10d. net, which sum was tendered.

E. S. Fay and *John Main* for the defendants. The defendants are exempted from their obligation to deliver the plaintiffs' goods and are protected against the plaintiffs' claim by the provisions of conditions 14 and 16 of the Standard Terms and Conditions of Carriage (Conditions " B "), to which the doctrine of contra proferentes does not apply because the conditions were settled by the Railway Rates Tribunal. The opening words of condition 16, " The company shall not in any case be liable . . . ," indicate that the draftsmen were trying to make it all-embracing. The words " loss " or " damage " in paragraph (*c*) can have two meanings. By reference to condition 3, non-delivery of the whole consignment must be loss or damage to the goods and condition 16 therefore covers the case where the plaintiff is deprived of his goods because the defendants cannot deliver them. The goods were lost to the plaintiffs when the defendants exercised their right and sold them. [Reference was made to *Hartstoke Fruiterers Ld.* v. *London, Midland and Scottish Railway Co.*[2]] If, contrary to that submission, it is said that " loss " means actual physical loss and not merely loss to the plaintiffs, the defendants are protected in respect of the greater part of the claim, because the goods when they were sold had deteriorated and were sold for less than their original value.

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[2] [1943] K.B. 362; 59 T.L.R. 217; [1943] 1 All E.R. 470.

Condition 14 equally protects the defendants; if they establish that the goods, which were perishable merchandise, were not delivered in consequence of stoppage or restraint of labour, they had the power of sale. [Reference was made to *Reader* v. *South-Eastern and Chatham Railway Co.*[3]]

[McNAIR J. There appears to be a fundamental obligation in condition 3 to accept responsibility for loss arising from misconduct of the railway company or its servants.]

Condition 3 is an exemptive condition like conditions 14 and 16; otherwise the defendants would be liable for any non-delivery. It is less exemptive in the case of non-delivery, because then it only applies if the defendants can establish that there was no negligence; that states the existing law in the case of a bailee.

[McNAIR J. That is subject to whether they are common carriers.]

The liability of common carriers is to be insurers of the goods except in so far as their duties are cut down. It may be that at common law the railways are common carriers, but they are not common carriers under the Owner's Risk Conditions (Condition "B"). Condition 3 cuts down the defendants' liability so that they are only liable for wilful misconduct; that is, conduct which the employee knows to be wrong and will cause loss. It is conceded that workmen who refuse to deliver perishable goods may be guilty of wilful misconduct.

[McNAIR J. Can I give effect to condition 14 as well as to condition 3?]

Condition 3 cannot affect the matter one way or the other. Precisely the same condition as condition 14 appears in the Company's Risk Conditions (Conditions "A," condition 15). It would be an odd result if the defendants were protected against a strike of their men when the goods are carried under Company's Risk Conditions, and not protected when the goods are carried under Owner's Risk Conditions. If one regards condition 3 simply as an exemptive condition, then there is no conflict between condition 3 and condition 14 (*d*). If condition 14 stood alone, it could not be said that it did not exempt the defendants from the consequences of strikes of their own men. Properly construed, condition 3 does not affect the matter because it is an exemption clause which of itself puts no liability on the company, and therefore cannot affect condition 14, which is another exemption.

The words in brackets in condition 14 "(without prejudice to

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[3] (1921) 38 T.L.R. 14.

"any claim or right which the sender or consignee may have "against the company otherwise arising under these conditions)" do not affect the defendants' right to rely on that condition. If the words mean that the trader is protected except in respect of the sale, then condition 14 gives the defendants no exemption at all; similarly, if the word "otherwise" means under condition 3, then there is no exemption granted by the condition. [Reference was also made to *Hick* v. *Raymond and Reid*.[4]]

The immediate cause of the non-delivery and sale of the plaintiffs' goods was undoubtedly the restraint of labour at Bishopsgate. Provided that the defendants acted reasonably they are protected. [Reference was made to *Springer* v. *Great Western Railway Co.*[5] and *Sims & Co.* v. *Midland Railway Co.*[6]] If it is right to say that there is nothing in condition 3 which affects condition 14, and that the fact that the restraint was that of the defendants' own men is irrelevant, then it is a question of fact whether there was a restraint. The question arises whether the words are apt to cover a restraint relating to consignments to one particular consignee. Partial restraint is considered in *Tabb & Burletson* v. *Briton Ferry Works Ld.*[7] [*D. C. Thomson & Co. Ld.* v. *Deakin*[8] was referred to.]

The restraint of the Billingsgate men, as evidenced by their ultimatum, was certainly a cause of the defendants' non-delivery, but the question arises whether it was a proximate cause. From the time that the Billingsgate men had shown force on September 8—when they did not merely threaten to stop Bishopsgate fish, but did in fact do so—there was a restraint. That being so, it was reasonable for the men at Bishopsgate to take the action which they did and it would have been reasonable for the defendants to stop the consignment.

If the defendants are protected, as it is submitted they are, they have done nothing to disentitle them to that protection. To say that the defendants should do all in their power to carry out their contract, as suggested by Rigby L.J. in *In re Richardsons and M. Samuel & Co.*,[9] is putting the duty too high. The defendants' duty is to take all reasonable steps to carry out the contract: *per* Lord Esher M.R. in *Bulman & Dickson* v. *Fenwick & Co.*[10] It is submitted that, on the facts, the defendants did act

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[4] [1893] A.C. 22.

[5] [1921] 1 K.B. 257.

[6] [1913] 1 K.B. 103; 29 T.L.R. 81.

[7] (1921) 6 Ll.L.Rep. 181.

[8] [1952] Ch. 646; [1952] 2 T.L.R. 105; [1952] 2 All E.R. 361.

[9] [1898] 1 Q.B. 261, 267; 14 T.L.R. 5.

[10] [1894] 1 Q.B. 179, 185; 10 T.L.R. 45.

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W. YOUNG & SON (WHOLESALE FISH MERCHANTS) LD. v. BRITISH TRANSPORT COMMISSION.

reasonably. If they had allowed the plaintiffs' fish to be delivered through Bishopsgate, with, for example, the help of the police force, there would have been a complete stoppage of work and then all the other consignees would have been able to say that the defendants had acted unreasonably.

Elliot Gorst Q.C. and *Dudley Collard* for the plaintiffs. Condition 3 exempts the railway company from every conceivable contingency which could cause the loss unless the consignor proves that it was due to wilful misconduct or, in the case of non-delivery, to negligence. The company have to prove that failure to deliver was not due to the wrongful act of the company or their servants. Condition 3 is the governing condition. It does not give exemption in the case of restraint of labour. If it stood alone it would determine the case in the plaintiffs' favour. The doctrine of contra proferentes should apply because the terms and conditions of carriage are those put forward by the railway company. Those conditions do not give the trader additional rights, but cut down his rights at common law or under statute very considerably. The court would be very slow to cut down those rights even more. There are cases which suggest that the railways are common carriers, but there is no express conclusion.

The rights given to a trader by condition 3 are expressly preserved in condition 14 by the words in brackets. Condition 14 is not giving extra immunity to the railway company; it is a procedural condition which provides what is to happen to goods left on the company's hands. On one view of the matter there is no conflict between conditions 3, 14 and 16, but, if there is a conflict, then the clear words of condition 3 should override the words in conditions 14 and 16 which are ambiguous.

Condition 16 does not apply to the facts of the present case. The goods have been neither lost, damaged, nor delayed. "Loss" means loss of the consignment. The goods were never lost because they arrived safely at Bishopsgate. The word apt to describe what happened to these goods would be "detention." In condition 3 "detention" is expressly used. Once the goods arrived at Bishopsgate the defendants held them as warehousemen. When they sold them they converted them to their own use. In those circumstances the conditions operate for the plaintiffs' benefit and entitle them to succeed in the action.

Condition 3 does not absolve the defendants, but deals with the onus of proof, which rests on the defendants. The non-delivery, which is the breach of the contract, is conceded, and therefore condition 3 is brought into operation. Condition 14 contemplates a general restraint ejusdem generis with riots, civil commotions, strikes, etc., but the restraint in the present case was the boycott of a particular trade. Boycott of a particular trade or address takes the case out of the restraint of labour class and puts it into the wilful misconduct class. That is not restraint of labour, but insubordination. The greater the compass of insubordination, the greater the duty on the defendants to act firmly: see the General Strike cases. The conditions were based on the old doctrine of force majeure. There was no force majeure in the present case. The defendants were not entitled to fold their arms and do nothing: *Bulman & Dickson* v. *Fenwick & Co.*[11] They should have taken practical steps to deal with the matter. In *Bulman's* case [11] there was an express finding of fact that the carriers had done everything in their power that was reasonable. There was no reason to believe that if the fish had been delivered there would have been a strike at Billingsgate, and accordingly the non-delivery was not caused by restraint of labour. There was a probability of trouble, but not necessarily with regard to the particular consignment in question. Apprehension is not sufficient; there had to be a certainty of restraint of labour in respect of that particular consignment. One can look at the subsequent events to see what the probabilities really were: *per* Lord Sumner in *Bank Line Ld.* v. *A. Capel & Co.*[12] The meeting held after the events complained of was successful and could have been held at an earlier stage.

The reasoning in *Hackney Borough Council* v. *Doré* [13] applies to a strike not amounting to a force majeure. Where peril is not actually in operation it cannot be prayed in aid to justify a breach of duty: *Becker, Gray & Co.* v. *London Assurance Corporation.*[14] Exemptive provisions should be construed strictly against the party relying on them: *per* Lush J. in *Taylor* v. *Liverpool and Great Western Steam Co.*[15] In *Gill* v. *Manchester, Sheffield and Lincolnshire Railway Co.*[16] a porter had acted unreasonably and the exemption clauses did not operate.

Cur. adv. vult.

March 15. McNAIR J., reading his judgment, stated the facts and continued: On the facts so narrated, I am satisfied (1) that the action of the Bishopsgate men in refusing to handle the consignment in question amounted to "wilful misconduct" within the meaning of condition 3, if this condition be applicable; (2) that the action of the Bishopsgate men in carrying out a decision of or approved by their local departmental committee amounted to a partial stoppage or restraint of labour within the meaning of conditions 14 and 16 (if applicable) (see *Tabb & Burletson* v. *Briton Ferry Works Ld.*,[1] *D. C. Thomson & Co. Ld.* v. *Deakin*[2]) and was not merely an act of insubordination by a particular group of men; (3) that such action did in fact prevent delivery in accordance with the contract; (4) that it would have been impracticable to effect any alternative delivery otherwise than through the normal machinery of Billingsgate Market which the plaintiffs were not prepared to accept; and (5) that there was no failure by the railway officials either on September 29 or at any earlier material date to take reasonable steps to prevent such action or to avert its consequences.

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[11] [1894] 1 Q.B. 179, 185.

[12] [1919] A.C. 435, 454; 35 T.L.R. 150.

[13] [1922] 1 K.B. 431; 38 T.L.R. 93.

[14] [1918] A.C. 101; 34 T.L.R. 36.

[15] (1874) L.R. 9 Q.B. 546, 549.

[16] (1873) L.R. 8 Q.B. 186.

I next turn to the question whether, on the facts so found, the defendants are protected by conditions 14 and 16 on which they rely. The main difficulty in the way of the defendants is the presence in the conditions of condition 3.

On the basis of this condition, it was argued on behalf of the plaintiffs that, though in form this condition is exemptive, properly construed it affirmatively imposes liability upon the company where the loss, and in particular the non-delivery, has arisen from the wilful misconduct of the company's servants, and that accordingly the phrase "restraint of labour," etc., in conditions 14 and 16 must be read as not applying to restraint of labour of the company's own servants, or at least as not applying when such restraint of labour on their part amounts to wilful misconduct. Further in support of this contention, it is urged that the words in brackets in condition 14, namely, "without prejudice to any claim or right which the sender or "consignee may have against the company otherwise arising "under these conditions," are designed or, if not designed, are apt to preserve the claim under condition 3. Counsel were not able to refer me to, nor have I been able to find, any reported decision in which the relationship between those two conditions has been considered. It is true that in *Reader* v. *South-Eastern and Chatham Railway Co.*[3] (a case arising out of the railway strike of 1919 and before the Standard Terms and Conditions had been settled by the Railway Rates Tribunal under the Railways Act, 1921), Rowlatt J. held that somewhat similar conditions relating to strikes did exempt the company from the consequences of a strike of their own men. But an examination of the record in that case does not disclose whether the carriage was at owner's risk rates or whether in the terms of carriage there was any condition comparable with condition 3, though it is clear from such cases as *H. C. Smith Ld.* v. *Great Western Railway Co.*,[4] and other cases, that the conditions applicable to owner's risk rates did prior to 1921 include provisions exempting the company for loss unless proved to have arisen from wilful misconduct of their servants. On the whole, though with some doubt, I have come to the conclusion that the plaintiff's argument on this point should not prevail. First, I do not consider that it is right to read condition 3 as imposing affirmatively on the company responsibility for loss arising from wilful misconduct. Condition 3 is only one of a number of exemptive conditions, upon any one of which the company can rely if they can bring themselves within its terms fairly construed. By way of illustration, I refer to condition 4, which exempts the company from liability for loss "(from whatever cause arising) of or to any "articles or property described in the Carriers Act, 1830, . . . "when the value . . . exceeds £25, unless the nature and value "thereof be declared on delivery to the company . . ." Secondly, it is not without significance that in the Standard Terms and Conditions of merchandise when carried at company's risk rates it is clear that the present argument would not be open to the plaintiffs, since there is in these conditions no provision comparable with condition 3. It would be strange indeed if the Railway Rates Tribunal approved conditions exempting the company from loss arising from strikes of their own servants (see conditions 15 and 17) when carried at company's risk rates and at the same time denied them such exemption when the goods were carried at owner's risk rates. Further, I think it is possible, without undue straining of the language used, to confine the effect of the saving words in the brackets in condition 14 to cases where the claim or right arose before the happening of the events which gave rise to the right of sale. For instance, if goods in transit are damaged or pilfered in such circumstances as to impose liability on the company before the events occurred which made delivery impossible, a claim for that damage or pilferage would be preserved notwithstanding a subsequent sale under condition 14.

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[1] (1921) 6 Ll.L.Rep. 181.

[2] [1952] Ch. 646, 663; [1952] 2 T.L.R. 105; [1952] 2 All E.R. 361.

[3] (1921) 38 T.L.R. 14.

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[4] [1922] 1 A.C. 178; 38 T.L.R. 359.

I accordingly hold that the defendants are, in the events which have happened, protected by condition 14. I should, however, have felt great difficulty in holding that protection was given by condition 16, since, as at present advised, I am disposed to the opinion that the word "loss" in the phrase "loss, damage "or delay" in paragraph (*c*) of that condition refers to physical loss of the goods and does not cover that form of pecuniary loss which the plaintiffs have suffered in this case from the sale of their goods by the defendants.

The conclusion at which I have arrived also makes it unnecessary for me to reach any affirmative holding on the alternative plea advanced by the defendants, namely, that the failure to deliver was due to a strike, stoppage or restraint of labour by the Billingsgate men. On this it was argued by counsel for the plaintiffs that mere apprehension of a strike is not sufficient, and reference was made to such cases as *Bank Line Ld.* v. *A. Capel & Co.*[5]; *Becker, Gray & Co.* v. *London Assurance Corporation*[6]; and *Hackney Borough Council* v. *Doré.*[7] Had it been material, I should have been disposed to hold that inasmuch as, on my appreciation of the facts, an attempt to force the plaintiffs' delivery through would have resulted in a refusal by the Billingsgate men to handle any of the Danish fish traffic, the defendants' failure to deliver to the plaintiffs was not due to a mere apprehension of a restraint, but to an existing condition of restraint. It seems to me that it can well be said that delivery of a particular consignment is prevented by a strike if an attempt to deliver this consignment would be that strike action would be directed against all the other consignments being handled at that time. However, as I stated above, in view of the conclusions which I have reached on the main case, it is not necessary for me to pronounce any affirmative conclusion or finding on this latter matter.

Judgment for the defendants.

Solicitors: *Edell & Co.; M. H. B. Gilmour.*

C. J. E.

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[5] [1919] A.C. 435, 454; 35 T.L.R. 150.

[6] [1918] A.C. 101; 34 T.L.R. 36.

[7] [1922] 1 K.B. 431; 38 T.L.R. 93.

SCHNEIDER *v.* LEIGH.

[1954 S. No. 1149.]

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Mar. 15, 30.

Singleton, Hodson and Romer L.JJ.

Practice and Procedure—Discovery—Privilege—Limited to litigant—Medical report obtained by defendants for purpose of litigation—Paragraphs of report sent by defendants' solicitors in letter to plaintiff's solicitors, and shown by them to plaintiff—Action for libel commenced by plaintiff against doctor—Defence of privilege by doctor—Whether legal professional privilege possessed by defendants in first action extends to the defendant in a second action.

A firm of solicitors, acting for the defendants in an action for damages for personal injuries, having obtained a medical report from a doctor on the plaintiff's injuries, wrote a letter to the plaintiff's solicitors in which they quoted extracts from the report. The letter was shown by the plaintiff's solicitors to their client, who, regarding those extracts as defamatory, commenced an action for libel against the doctor and claimed disclosure of the full medical report and of correspondence relating thereto. The doctor claimed the protection of the privilege admitted to be possessed by the defendants in the first action:—

Held (*per* Hodson and Romer L.JJ., Singleton L.J. dissenting) that the privilege which was accorded to litigants to protect them in the preparation of their case belonged only to the litigant or his successors in title and did not extend to a proposed witness who became a party to a subsequent and different action.

Dictum of Sir George Jessel M.R. in *Wheeler* v. *Le Marchant* (1881) 17 Ch.D. 675, 682 applied.

Dictum of Sir Nathaniel Lindley M.R. in *Calcraft* v. *Guest* [1898] 1 Q.B. 759, 761 explained.

Decision of Donovan J. (in chambers) reversed.

APPEAL from Donovan J.

The plaintiff, a travelling salesman for a food product firm, was on December 22, 1952, involved in a motor-car accident with a vehicle owned by the Pedigree Stock Farm Developments Co. Ld. He suffered injury and instituted proceedings against the company for damages. Towards the end of 1953 Messrs. William Charles Crocker, solicitors acting for the Pedigree Stock Farm Developments Co., or for their insurers, instructed Dr. Leigh to make a further examination of the plaintiff, who was then an inmate of a Bournemouth hospital and said to be suffering from traumatic neurosis, due to his injuries received in the accident. The examination took place on January 1, 1954, and in due course Dr. Leigh made his report to Messrs. Crocker.

On February 4, 1954, the solicitors wrote to Messrs. Israel, Joslin & Co., the plaintiff's solicitors, a letter in which they offered to settle the damages claim for £2,500, and at the same time quoted verbatim two paragraphs from the medical report of Dr. Leigh. The plaintiff's solicitors showed the letter to their client. The plaintiff regarded the quoted paragraphs as defamatory and on his instructions his solicitors, on his behalf, on March 11, 1954, commenced an action against Dr. Leigh, claiming damages for libel and alleging that the doctor was guilty of malice.

By his defence Dr. Leigh, while not admitting that he wrote or published the paragraphs of which the plaintiff complained, submitted that his report was privileged, having been obtained for the purposes of the action between the plaintiff and the Pedigree Stock Farm Developments Ld.

The plaintiff applied for an order for the discovery and inspection of the whole report of Dr. Leigh and of all other documents which had passed between the doctor and the solicitors for the defendant company. Donovan J. (in chambers), affirming the decision of a master, refused the order and the plaintiff now appealed.

C. L. Hawser for the plaintiff. It is submitted that the defendant is bound to disclose the parts of his report which were quoted in the letter sent by Messrs. Crocker to the plaintiff's solicitors; that the publication was authorized by the insurance company, which is the actual defendant in the damage action; and that the doctor's report, though privileged in the damage action, is not privileged in the libel action, in which it is admitted to be relevant. The plaintiff is entitled to know what he has to meet. If there is any privilege attaching to the medical report it is the privilege of Pedigree Stock Farm Developments Ld., but once their solicitors are authorized to communicate paragraphs of that report to the plaintiff's solicitors there is no longer any privilege. The defendant in this action against him is pleading that the report is absolutely privileged. He is saying that he must not show the document to the plaintiff because the defendant in the damage action is entitled to claim that it is privileged. Donovan J. took the view, wrongly, it is submitted, that because the sending of the report by Dr. Leigh to the Alliance Insurance Co. or to Messrs. Crocker was absolutely privileged for the damage action it could not be shown to anybody; that if a document is privileged because it came into existence for the purposes of the action against Pedigree Stock Farm Developments Ld., that privilege attaches to it in any circumstances for any litigation. Privilege is basically the privilege of the client who causes the document to be brought into existence, but if the document gets into the hands of another person it is no longer privileged. Messrs. Crocker wrote the letter of February 4, 1954, on behalf of Pedigree Stock Farm Developments Ld. and, it is submitted, were waiving the company's privilege. In *Wheeler* v. *Le Marchant*[1] Sir George Jessel M.R. said: "The protection is of a "very limited character, and in this country is restricted to the "obtaining the assistance of lawyers as regards the conduct of "litigation or the rights of property. It has never gone beyond "the obtaining legal advice and assistance, and all things reason- "ably necessary in the shape of communications to the legal "advisers are protected from production or discovery in order "that that legal advice may be obtained safely and sufficiently." The dictum of Sir Nathaniel Lindley M.R. in *Calcraft* v. *Guest*[2] is not applicable; it deals only with the extension of the privilege to a successor in title. [*Conlon* v. *Conlons Ld.*[3] was also referred to.]

Eric McLellan for the defendant. *Calcraft* v. *Guest*[4] is the strongest possible authority for the indefinite continuation of the privilege of the original litigant, and it takes the form of making the document itself privileged. The basis of the rule is that when a party is engaged in litigation he must be able to make a clean breast to his legal adviser, and the latter must be free to make any inquiry that is necessary. Where litigation is merely personal and the interest dies with the person the privilege is determined. In the present case there is attaching to the doctor's report a privilege which is the privilege of Pedigree Stock Farm Developments Ld. and this document may not be disclosed. It is submitted that any expert witness who has communicated matters connected with the preparation of a case for trial is bound to assert the privilege of the litigant while that case is still in existence. [Bray's Supplement, article 59, and *Watson* v. *M'Ewan*[5] were referred to.]

Cur. adv. vult.

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[1] (1881) 17 Ch.D. 675, 681.

[2] [1898] 1 Q.B. 759, 761.

[3] [1952] 2 All E.R. 462; [1952] W.N. 403; [1952] 2 T.L.R. 343.

[4] [1898] 1 Q.B. 759, 761.

[5] [1905] A.C. 480, 487.

March 30. The following judgments were read.

SINGLETON L.J. This appeal raises questions on discovery and inspection of documents in an action in which the plaintiff claims damages for libel against the defendant, Dr. Leigh. The defamatory matter is alleged to be contained in a report from Dr. Leigh to the solicitors for the defendants in another action. The report is said to have been written and published in January or February of 1954.

The plaintiff, Schneider, was injured in an accident on December 22, 1952, and he claimed damages against the employers of the driver of the motor-car, namely, Pedigree Stock Farm Developments Ld. The solicitors for the defendants in that action were Messrs. William Charles Crocker, acting, no doubt, for an insurance company. Some time towards the end of the year 1953 Messrs. Crocker instructed Dr. Leigh to make a further examination of the plaintiff. The examination was made on January 1, 1954, and it is said that in his report to Messrs. Crocker, or to the insurance company, Dr. Leigh published defamatory matter of the plaintiff. For some reason, which I do not understand, the solicitors, in their letter to the plaintiff's solicitors, set out two paragraphs of Dr. Leigh's report. I will read the letter in full. It is addressed to Messrs. Israel, Joslin & Co. and dated February 4, 1954. It reads: "As you "know, Dr. Denis Leigh made a further examination of your "client Mr. Abraham (Alfred) Schneider at St. Ann's Hospital, "Canford Cliffs, Bournemouth, on January 1, 1954, in the "presence of Doctors Taylor and Parfitt, and his report thereon "has been shown to our clients who have instructed us forthwith "to bring this matter to a head. We quote, for your informa-"tion, part of this report: 'I then asked Schneider what he "'would do if I recommended that he go back to work at once. "'He replied that he would do, but that he would need three "'secretaries, a chauffeur and sundry other bodies to do the "'work he formerly carried out single handed, because he "'would be unable to do the work himself. I then asked him "'how long he thought it would be before he recovered, and "'he stated that he could wait 50 or 60 years if necessary. His "'demeanour during this interview was almost a caricature— "'lying in bed smoking a cigar in his private single room, the "'picture of comfort, with his radio and photographs. He was "'cocksure, arrogant and self-opinionated.' It is our medical "evidence that if your client had gone back to work within a

" few days of receiving the slight bump on the head in the " accident of December, 1952, he would have forgotten all about " the matter forthwith and would have suffered only a few " pounds' worth of damage. Instead he has chosen for many " months to live in luxurious idleness at St. Ann's Hospital and " he still shows no sign whatsoever of making any attempt to " diminish his damages. From this interview of January 1, " 1954, and from earlier interviews with doctors examining him " on behalf of our clients, it is abundantly clear that he has " every expectation of living in luxury at the expense of our " clients for many years to come. We have let the matter go " this far because it has been stated that his own medical advisers " have agreed to and advised the course he has taken. We must " now inform you that such advice will be strongly contested, " and that our clients have no intention whatever of paying one " penny piece to your client for any reputed loss caused by further " idleness. Our clients have endeavoured to put aside their " indignation at his behaviour and to view the measure of " damage in an impartial way and though they dislike doing so, " they are prepared to offer and do offer now a total sum of " £2,500 (Two thousand five hundred pounds) to your client in " full and final settlement of any claim he may have against " our clients. If this offer is not accepted within fourteen days, " we hope you will understand that any proceedings brought in " the future by your client will be strongly contested, for it is " their view on the medical evidence that your client should at " least have attempted to work many months ago."

Messrs. Crocker were the solicitors on the record for the defendants, Pedigree Stock Farm Developments Ld. It may be that their instructions, whatever they were, came from the insurance company. The plaintiff's solicitors, Messrs. Israel, Joslin & Co., showed the letter to their client, which may not have been anticipated by the defendant's solicitors. In the result, the plaintiff's solicitors, on his behalf, commenced this action against Dr. Leigh, claiming damages for libel in Dr. Leigh's report. It is alleged that the two paragraphs are defamatory of the plaintiff, and that Dr. Leigh was guilty of malice. The material allegations are set out in the statement of claim, and I do not think it is necessary that I should read them.

By his defence Dr. Leigh claims privilege, while not admitting that he wrote or published that of which complaint was made. The claim of privilege arises in the litigation between the plaintiff and Pedigree Stock Farm Developments Ld. The

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solicitors for the defendants asked Dr. Leigh to examine the plaintiff and to report to them. Dr. Leigh did so. The document which came into existence was something obtained by the solicitors for a party to litigation, or to anticipated litigation, for the purpose of meeting or resisting the claim, and, prima facie, the occasion of publishing it was a privileged occasion and the document is privileged. The privilege is the privilege of the defendants in that litigation, namely, the company.

The plaintiff now seeks discovery and inspection of the whole of the report of Dr. Leigh and of other documents which have passed between him and the solicitors for the defendant company. The present action was commenced on March 11, 1954. We were not informed as to what the position is in regard to the plaintiff's claim for damages for personal injuries, though a writ had been issued in September, 1953. It is obvious that the defendants to that claim may be put into considerable difficulty if, as the result of the letter of February 4, 1954, the report, or reports, of the witness have to be disclosed in this action.

On behalf of the plaintiff it is submitted that the letter of February 4 amounts to a withdrawal of privilege in respect of the report of Dr. Leigh. I am unable to see that this is so. There is no statement to that effect; the mere recital by solicitors to the solicitors on the other side of a part of a report does not mean that their clients had authorized them to waive the question of privilege—entirely apart from the question whether the letter was written on behalf of the defendants or of the insurance company, by whom, presumably, the making of an offer was authorized. The defendant, Dr. Leigh, in his list of documents, disclosed under the First Schedule, Part II—letters and copies of letters passing between the defendant and Messrs. William Charles Crocker and the defendant's notes and reports of his examinations of the plaintiff—and he claims that those documents are privileged on the grounds set out in paragraph 2. This is the basis of the claim: "The said defendant "objects to produce the documents set forth in the second Part "of the First Schedule hereto on the grounds that those "numbered 1, 2 and 3 are, as appears from their nature and "description, privileged from production, and as to those "numbered 4, these consist of instructions by Messrs. William "Charles Crocker, solicitors, to the defendant to carry out "examinations of the plaintiff on behalf of their clients Pedigree "Stock Farm Developments Ld. and/or The Alliance Assurance

"Co. Ld. with whom the said Pedigree Stock Farm Developments Ld. were insured, and the defendant's replies thereto "and the defendant's notes and reports on his examinations of "the plaintiff, and which letters, notes and reports came into "existence and were made in respect of a claim for damages by "the plaintiff against the said Pedigree Stock Farm Developments Ld. and in contemplation of litigation therein, for the "purpose of obtaining for and furnishing to the solicitors to the "said Pedigree Stock Farm Developments Ld. evidence and "information for the use of the said solicitors to enable them "to conduct the defence to the said action and to advise the "defendants and their insurers therein."

The plaintiff claims that all those documents should be produced for inspection as the privilege is the privilege of Pedigree Stock Farm Developments Ld. and does not exist for Dr. Leigh. Both the master and Donovan J. declined to make an order for inspection. The plaintiff appeals to this court.

This branch of the law of privilege is for the purpose of enabling a litigant, or a party to an impending litigation, to prepare his case. Statements must be taken, and sometimes reports must be obtained. Prima facie they are the subject-matter of privilege. The privilege is that of the litigant, but it enures for the benefit of the one who makes the statement or report. If it did not, the difficulties in litigation would be almost impossible. Who would make a statement to a solicitor if he was faced with the risk of an action for libel by the opposite party? It is not so much the fear of the result, but the worry of proceedings, which would deter potential witnesses from giving statements. A statement so given should, generally speaking, be regarded for this purpose in the same light as if it was given in court. In *Wheeler* v. *Le Marchant* [1] Sir George Jessel M.R. said: "The protection is of a very limited character, and in this "country is restricted to the obtaining the assistance of lawyers, "as regards the conduct of litigation or the rights to property. "It has never gone beyond the obtaining legal advice and "assistance, and all things reasonably necessary in the shape "of communication to the legal advisers are protected from "production or discovery in order that that legal advice may be "obtained safely and sufficiently."

There has been no waiver of the privilege which is claimed, and the court is not concerned with what might happen if it had been waived. Sir Nathaniel Lindley M.R. said in *Calcraft* v. *Guest*[2]: "I take it that, as a general rule, one may say "once privileged always privileged."

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[1] (1881) 17 Ch.D. 675, 681, 682.

It was suggested by Mr. Hawser that the court might make an order for discovery and inspection to take place after the action for damages for personal injuries had ended. I do not know that any such suggestion was made to Donovan J., against whose order this appeal is made. In any event, I do not consider that any such order should be made in this unusual case. So far as I know, there is no precedent for it. It would be a kind of threat hanging over one who is expected to be a witness in the action for damages for personal injuries. The plaintiff commenced this action, and appears to have let the other action lie. To make an order of the kind now suggested would be a departure from the recognized practice, and would have the effect of deterring potential witnesses from giving statements to solicitors whose clients were concerned in, or faced with, litigation. I would dismiss the appeal.

HODSON L.J. stated the facts and continued: The claim to privilege from production is based on what is called "legal pro-"fessional privilege," the scope of which is stated by Sir George Jessel M.R. in *Wheeler* v. *Le Marchant*[3] as follows: "The "protection is of a very limited character, and in this country is "restricted to the obtaining the assistance of lawyers, as regards "the conduct of litigation or the rights to property. It has "never gone beyond the obtaining legal advice and assistance, "and all things reasonably necessary in the shape of communi-"cation to the legal advisers are protected from production or "discovery in order that that legal advice may be obtained safely "and sufficiently."

It is conceded by the defendant that the medical reports which form the basis of the libel action were brought into existence in contemplation of the action brought by the plaintiff against the company, and that privilege from production accordingly attaches to the company in the proceedings taken by the plaintiff against it. The question is whether the privilege from production extends beyond the company, so as to protect the defendant in separate proceedings brought against him, although the privilege is not his, but that of the company.

It is essential to bear in mind that the privilege is the privilege of the litigant, accorded to him in order that he may be protected in preparing his case, and not the privilege of his witnesses as such. The litigant can waive the privilege if he chooses, and if he does so the proofs of his witnesses can be shown to the opposing party without the witnesses having any ground for complaint. What is being sought here is, in effect, to extend the umbrella of the protection which the privilege gives the company to the defendant, who is, on the hypothesis that he is the author of the libel, to be looked at for the purpose of this application as a proposed witness on behalf of the company. In this capacity not only has he no privilege of his own, but he is under no duty to assert the right of the company to resist the production of any documents.

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[2] [1898] 1 Q.B. 759, 761.

[3] 17 Ch.D. 675, 681, 682.

I have emphasized that the privilege is the privilege of the company. This statement is subject to the qualification that the privilege enures for the benefit of successors in title to the party to an action, at any rate, where the relevant interest subsists. (See *Minet* v. *Morgan*.[4]) It has been argued for the defendant, however, that the privilege is not limited to the original litigant, that is to say, the company and its successors in title; reliance being placed on a passage in the notes to R.S.C., Ord. 31, r. 1, in the Annual Practice (1955) at p. 498, which reads: "This (the litigation) need not be the litigation in which "the discovery is being sought, but may be other litigation, either "with the same or other persons, and either involving the same "or different subject-matter or questions, for as a general rule "'once privileged always privileged.'"

Authority for this note is that of Sir Nathaniel Lindley M.R., in *Calcraft* v. *Guest*,[5] who said: "Now, as regards professional "privilege, on looking at the authorities, it appears to me that "this case is covered by the case of *Minet* v. *Morgan*,[6] and "that if there are any documents which were protected by the "privilege to which I am alluding that privilege has not been "lost. I take it that, as a general rule, one may say once "privileged always privileged. I do not mean to say that "privilege cannot be waived, but that the mere fact that docu"ments used in a previous litigation are held and have not been "destroyed does not amount to a waiver of the privilege."

I think that the note in the Annual Practice states the proposition too widely. Sir Nathaniel Lindley M.R. was dealing with documents which had attached to them professional privilege in previous proceedings in which the predecessor in title to the plaintiffs in the action then before the court was involved. The headnote to the case correctly summarizes the facts and the decision on this point: " The defendant in an action " to try a right of fishery, after judgment had been given for " the plaintiff, accidentally discovered certain documents pre- " pared for the defence of a previous action dealing with the " same subject-matter, which action was defended at the cost " of a predecessor in title of the plaintiff. The plaintiff obtained " possession of the documents after copies of them had been " taken by the defendant. The defendant having appealed:— " *Held*, (1) following *Minet* v. *Morgan* that the documents " remained privileged."

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[4] (1873) L.R. 8 Ch. 361.
[5] [1898] 1 Q.B. 759, 761.
[6] L.R. 8 Ch. 361.

Sir Nathaniel Lindley M.R. was, I think, intending to do no more than follow the decision in *Minet* v. *Morgan*,[6] which also dealt with privilege from production in a case of a successor in title. His language must be read in the light of the facts with which he was then dealing, and does not, when properly understood, lend support to the wide proposition contended for by the defendant in this action.

This view is not, in my opinion, open to the objection that it exposes witnesses in legal proceedings to an undue risk of proceedings for libel. The law already provides the protection necessary to a witness whose proof is taken for the purpose of litigation, since the occasions on which statements are made in such cases are privileged. Whether the privilege is absolute or qualified is one of the matters raised in the action. Accordingly, I express no opinion upon it.

Mr. Hawser has stated on behalf of his client that if the appeal is allowed he consents to an order for inspection to take effect only when the action against the company has been disposed of, so that there will be no question of interference with the company's privilege. I would allow the appeal and make an order in terms giving effect to the consent given by counsel for the plaintiff.

ROMER L.J. (read by Hodson L.J.). There is no doubt but that the report which, as the plaintiff alleges, was made by the defendant, was (if in fact made) brought into being for the purposes of Pedigree Stock Farm Developments Ld., in connexion with actual or anticipated litigation between that company and the plaintiff. The report was, accordingly, a privileged document, and the company could not be compelled to produce it for the plaintiff's inspection; nor could they be compelled to produce correspondence or other communications between the company or its solicitors and the defendant which resulted in, or were consequent upon, the making of the report. The defendant, however, seeks to say that because of the privilege which exists in that action (which, we were told, is now pending) he cannot be compelled to produce the documents for the plaintiff's inspection in the present proceedings.

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[6] L.R. 8 Ch. 361.

In order to establish this claim the defendant must show, as it seems to me, either that the privilege in the first action is one which he as well as the company can assert, or that he at least has such an individual right to share in the protection which the privilege affords to the company that the latter cannot waive the privilege without his consent. In my judgment, however, neither of these views is capable of being sustained. The privilege which exists in the first action is, in my opinion, that of the company and of no one else; and the company can at any time waive the privilege without the defendant's consent and, indeed, without any reference to him at all.

Mr. McLellan, for the defendant, did not shrink from contending before us (and he was logically bound so to contend) that in any action brought against the defendant at any future time by any plaintiff he could not be compelled to produce the documents in question because of the privilege which exists in relation to them in the action against the company—and even though that action had long since been brought to a conclusion. In support of this submission Mr. McLellan founded himself primarily upon the observations of Sir Nathaniel Lindley M.R. in *Calcraft* v. *Guest.*[7] Those observations, however, cannot be legitimately divorced from the issue to which the Master of the Rolls was addressing his mind, namely, whether or not the privilege of a litigant extends to his successor in title. This court, following *Minet* v. *Morgan*,[8] held that it does, but I am unable to attribute to the Master of the Rolls' observations the wide effect for which Mr. McLellan contends; and I respectfully agree with Hodson L.J. in thinking that the note on this subject which appears on page 498 of the current Annual Practice goes further than is warranted by *Calcraft's* case or any other decision.

The protection of privilege in relation to discovery extends

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[7] [1898] 1 Q.B. 759, 761.

[8] L.R. 8 Ch. 361.

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only to a litigant and his successors, and, in my opinion, it would be both dangerous and unwarranted to extend it so far beyond the limits which have been established by previous authority as the defendant invites us to do. In *Wheeler* v. *Le Marchant*[9] the defendants sought to protect from production letters which had passed between their solicitor and their surveyors before the dispute which led to the litigation arose. The Court of Appeal rejected this attempt, and in the course of his judgment Sir George Jessel M.R. said: "It appears to me that to give "such protection would not only extend the rule beyond what "has been previously laid down, but beyond what necessity "warrants. . . . It seems to me we ought not to carry the rule "any further than it has been carried. It is a rule established "and maintained solely for the purpose of enabling a man to "obtain legal advice with safety. That rule does not, in my "opinion, require to be carried further."

The defendant asks us in the present case to carry the rule which has been evolved for the protection of litigants further than it has ever, so far as I am aware, been carried before, by bringing within its scope not only the litigant himself, but also his prospective witnesses; so that any witness who has been approached by the litigant for a report, and has given it, can claim protection in respect of the contents of the report if he himself becomes a party to subsequent and wholly independent proceedings. For my part I feel quite unable to accept the invitation and (subject to giving effect to the concession which Mr. Hawser offered for the benefit of the Pedigree company, to which Hodson L.J. has referred) I would allow the appeal.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors: *Israel, Joslin & Co.; Le Brasseur & Oakley.*

A. W. G.

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[9] 17 Ch.D. 675, 682.

ATTORNEY-GENERAL *v.* COLCHESTER CORPORATION.

1955
Mar. 23,
24, 31.

Lord Goddard
C.J.

[1954 A. No. 1199.]

Ferry—Ancient franchise—Closure—Ferry owned by municipal corporation—Not extensively used and run at a loss—Operation discontinued—Relator action—Refusal of mandatory injunction to compel corporation to operate ferry—Refusal of declaration—Remedies available—Indictment—Scire facias.

Injunction—Mandatory injunction. Practice—Declaratory judgment. Scire facias.

A municipal corporation, which owned the franchise of a public ferry crossing a river between F., a village on the south bank, and W., a small town on the north bank, discontinued the operation of the ferry. In a relator action brought by the Attorney-General on behalf of a resident of F. for a declaration that the corporation was obliged to maintain and operate the ferry at all reasonable times, and to carry foot passengers willing to pay the toll, and a mandatory injunction commanding them so to do, the corporation admitted their obligation to operate the ferry, but contended that it had become so burdensome that no mandatory injunction ought to be granted. The ferry was not extensively used and the receipts from the toll charged were insufficient to pay the wages of the ferryman:—

Held, that although a ferry owner who failed to perform his obligations to the public could be indicted for breach of a public duty, and might also be the subject of a scire facias at the suit of the Crown to repeal the franchise, an injunction should not be granted to compel the owner to continue to run a ferry which was so little used that it could only be run at a loss, since it would be inequitable so to do; and as, in the present case, a bare declaration would be of no assistance to the relator or the residents of F., no declaration should be made.

Lumley v. *Wagner* (1852) 1 De G.M. & G. 604 and *Powell Duffryn Steam Coal Co.* v. *Taff Vale Railway Co.* (1874) L.R. 9 Ch. 331 applied.

Greene v. *West Cheshire Railway Co.* (1871) L.R. 13 Eq. 44 distinguished.

ACTION.

The defendants, the Colchester Corporation, were the owners of an ancient franchise ferry across the River Colne, in the County of Essex, from the town of Wivenhoe on the north bank, where the road from Colchester reached the river, to the parish of Fingrinhoe on the south bank, where a road called Ferry Road met the river. On October 1, 1952, the corporation discontinued the operation of the ferry. It was reopened and operated on an hourly service between March 1 and November 21, 1953, but finally closed on November 22, 1953.

The Attorney-General, on the relation of one Derrick Allen, a shipwright, who lived in Fingrinhoe and worked in Wivenhoe, alleged that the corporation, as ferry owners, were obliged to operate the ferry at all reasonable times and to carry all peaceable wayfarers who were ready and willing to pay the toll; that the corporation had wrongfully discontinued to operate the ferry and threatened and intended to close it permanently; and that such closure was injurious and caused inconvenience to the residents of Fingrinhoe and Wivenhoe and others of Her Majesty's subjects, a recognized highway for foot passengers and bicyclists from London and other places having been interrupted by the closure of the ferry. He claimed a declaration that the corporation were bound to maintain and operate the ferry and a mandatory injunction commanding them so to do.

The defendants, by their defence, admitted that they were under an obligation, as ferry owners, to run the ferry, and that they had ceased to operate it. They denied that any substantial injury, damage or inconvenience had been caused by its closure, and contended that even if it had, the operation of the ferry had become so burdensome to them that no injunction or mandatory order ought to be granted or made against them.

Cecil Binney for the plaintiff. The defendants admit that this is a franchise ferry which they are under a duty to operate, and they also admit that they have discontinued its operation. By their defence they are asking the court to assist them in breaking the law. [Reference was made to *Letton* v. *Goodden*,[1] which sets out the nature of a franchise ferry.] A grant of ferry is made on the ground that the ferry will always be available to the public; the fact that it can only be operated at a loss is no excuse for ceasing to operate it. If there be any loss suffered by the defendants that loss is trivial, having regard to their resources, when compared with the inconvenience caused to the public by its closure.

[LORD GODDARD C.J. The real question here is the nature of the remedy available. The defendants could have been indicted.]

Yes; but the penalty on indictment is merely a fine. The only way of compelling the defendants to reopen and operate the ferry is by obtaining a mandatory injunction. Where there is a breach of a public right, as in the present case, the Attorney-General is entitled to claim an injunction. It is no answer for the defendants to say that there is a remedy available in the criminal courts. An injunction is an equitable remedy designed to ensure that the defendants carry out their duties and not merely to ensure that they are punished for failing to do so. No doubt if one person only were injured by the closure of the ferry he could be compensated by damages, as in *Pelly* v. *Woodbridge Urban District Council*,[2] but that is not this case.

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[1] (1866) L.R. 2 Eq. 123.

L. K. E. Boreham for the defendants. The duties of a ferry owner and the remedies available to a person injured by the ferry owner's failure to carry out his duties are set out in Halsbury's Laws of England, 2nd ed., vol. 15, p. 27. If the owner fails to keep the ferry in good repair he is liable to be indicted and fined, or to an action at the suit of the person who has suffered damage. The Crown can annul the grant it is assumed to have made if the ferry owner neglects to carry out his duties, but there is no suggestion anywhere in the authorities that a mandatory injunction will lie to compel the owner to operate the ferry. There is no case other than *Pelly* v. *Woodbridge Urban District Council*[2] where such an injunction has ever been sought.

[LORD GODDARD C.J. Why should not an injunction lie in the case of a ferry as it has done in the case of a highway?]

It is a misleading analogy to compare a ferry with a highway. The fundamental difference is that whereas there can be an obstruction of a highway there can be no obstruction of the way over the water. A ferry is analogous more to a bus service over a highway than to a highway itself. A right of ferry is an oppressive burden, as the owner cannot divest himself of his obligation. That obligation can only be extinguished by Act of Parliament. The proper remedy here is for the Crown to revoke the grant and give the right to run the ferry to those local authorities prepared to operate it.

This is not a case where an injunction should be granted. Equity will not interfere to compel by injunction the performance of continuous acts which require the continuous employment of people: *Powell Duffryn Steam Coal Co.* v. *Taff Vale Railway Co.*,[3] *per* James L.J.,[4] who stated the general principle applicable here. There the plaintiffs had a statutory right to use the defendants' railway line but were unable to do so because the defendants refused to work the points and signals, but an injunction was refused by Hall V.-C. So, also, in *Ryan* v. *Mutual Tontine Westminster Chambers Association* [5] the court refused to enforce a covenant in a lease providing for the employment of a resident porter. In that case Lord Esher M.R.[6] distinguished certain railway cases where mandatory injunctions had been granted compelling railway companies to do certain building work, saying that they were exceptions to the general rule: see, for example, *Greene* v. *West Cheshire Railway Co.*[7] *Kennard* v. *Cory Brothers*,[8] where a mandatory injunction was granted ordering the defendants to carry out certain remedial work necessary as a result of damage caused to the plaintiff's land and buildings by the tipping of refuse, is also distinguishable because there the work to be done was clearly and readily determinable. Moreover, all three Lords Justices stated that the case ought not to be regarded as a precedent for any other case.

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[2] (1951) Unreported.

[3] (1874) L.R. 9 Ch. 331.

[4] Ibid. 335.

The court has never seen its way to compel a person to carry out a contract of personal services: *Lumley* v. *Wagner*.[9] It is merely fortuitous in the present case that the franchise of this ferry is owned by a corporation and not by an individual, but it is submitted that the same principles must apply in each case.

As to the claim for the declaration, it is submitted that a declaration ought not to be made where no other substantive relief is granted: *Attorney-General* v. *Dean and Chapter of Ripon Cathedral*,[10] *per* Uthwatt J.[11] In *Pelly* v. *Woodbridge Urban District Council* [12] Parker J. made a declaration while refusing an injunction, but he awarded the plaintiff damages in lieu. In the present case if it were not for the injunction the plaintiff would have no claim for relief at all. Moreover, the defendants have never disputed that this is a franchise ferry or that they are under a duty to operate it. In those circumstances a declaration would be purely academic and ought not to be granted. [Reference was also made to *Musgrave* v. *Horner* [13] and *Dyson* v. *Attorney-General*.[14]]

Binney in reply. *Pelly* v. *Woodbridge Urban District Council* [15] is distinguishable because that was a personal action and Parker J. dealt with it on that basis. All that the cases cited by the defendants show is that where an injunction has been refused a declaration has been refused also, but as a general principle the court can make a declaratory judgment, and it is submitted that in the present case the plaintiff is entitled to a declaration in any event as no admissions were made by the defendants until after the issue of the writ in the proceedings.

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[5] [1893] 1 Ch. 116; 9 T.L.R. 72.
[6] Ibid.
[7] (1871) L.R. 13 Eq. 44.
[8] [1922] 2 Ch. 1; 38 T.L.R. 489.
[9] (1852) 1 De G.M. & G. 604.
[10] [1945] Ch. 239; 61 T.L.R. 327; [1945] 1 All E.R. 479.
[11] [1945] Ch. 239, 249.
[12] Unreported.
[13] (1874) 31 L.T. 632.
[14] [1912] 1 Ch. 158; 28 T.L.R. 72.
[15] Unreported.

But it is submitted, further, that the plaintiff is entitled to an injunction. It would be reducing the law to an absurdity to say that although it has been established that this franchise ferry is not being operated the law will do nothing. The court will not order something which it is impossible to carry out, and it is not disputed that in certain cases an injunction will be refused where it would entail supervision by the court, but the injunction claimed here will not entail supervision; all that is claimed is an injunction to compel the defendants to carry out their common law duties.

[LORD GODDARD C.J. An injunction is not a common law remedy.]

This case is analogous to *Attorney-General* v. *Staffordshire County Council.*[16] The court will grant an injunction ordering a local authority to repair a road but it will not order the way in which it is to be carried out. There are cases in which the court has gone much further in ordering work to be done than is necessary here: see, for example, *Fortescue* v. *Lostwithiel and Fowey Railway Co.*,[17] a railway case with a difference. In *Lane* v. *Newdigate*[18] Lord Eldon made an order that a canal should be put in repair. It is true that it was done indirectly by restraining the defendant from keeping the canal out of repair, but it is submitted that if that case were decided today a direct order would be made to put the canal in repair. In *Attorney-General* v. *Roe*[19] a mandatory order was made requiring the defendant to restore a road. That case goes farther than the court is prepared to go in some cases in ordering work to be done, but there is no clear dividing line showing where an injunction will be refused on grounds of supervision. A ferry does not need constant supervision, and there is nothing to prevent the defendants obeying an order made by the court ordering them to carry out their duty.

[LORD GODDARD C.J. The ordinary remedy open to the Attorney-General at common law was the writ of scire facias to

[16] [1905] 1 Ch. 336; 21 T.L.R. 139.

[17] [1894] 3 Ch. 621.

[18] (1804) 10 Ves. 192.

[19] [1915] 1 Ch. 235.

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deprive the franchise owner of the franchise and give it to somebody else. I know of no means by which a man can be made to work a ferry. The defendants are a corporation and can only work through their servants. Suppose they cannot get a man to work the ferry. Can they be forced to operate it at a loss?]

So long as the defendants hold the franchise they are under an obligation to operate the ferry. That is their common law duty, which they have failed to carry out. It is irrelevant that other proceedings could be taken to deprive them of the franchise and grant it elsewhere.

[LORD GODDARD C.J. In so far as this is a matter of discretion, and a mandatory order is a matter of discretion, this ferry is not sufficiently used by general wayfarers to make it a real public convenience, so that the inhabitants of this village are in effect asking the defendants to maintain the ferry for their benefit.]

If the defendants assign the franchise to some other person or body they could move to dissolve the injunction on the ground that circumstances had changed. Alternatively, an injunction could be made for a limited period.

[LORD GODDARD C.J. If the plaintiff is entitled to a mandatory injunction he is perpetually entitled. That shows the virtual impossibility of granting such an injunction.]

[Reference was also made to *Hood* v. *North Eastern Railway Co.*[20]; *Attorney-General* v. *Sharp*[21]; *Attorney-General* v. *Wilcox*,[22] and *Attorney-General* v. *Roe*.[23]]

Cur. adv. vult.

March 31. LORD GODDARD C.J. read the following judgment, in which he stated the issues and continued: There were substantially no facts in dispute, but a certain amount of evidence was called, from which it appeared that Fingrinhoe is a somewhat scattered village and the inhabitants had been accustomed in the past and desire in the future to use the ferry for crossing to Wivenhoe, which is a place considerably larger in extent and population, and where there is a convenient railway service. Some two and a half miles by road there is another ferry at a place called Rowhedge, which is obviously not so convenient for the inhabitants of Fingrinhoe, as even if they approach it by a footpath which may be described as a short cut, the path crosses over fields which are often very wet, and there are four stiles on the path, so that it is not suitable for the use of perambulators or bicycles. To get from Fingrinhoe to Colchester Station, which is the only alternative to Wivenhoe, the bus service is inconvenient and involves a change at the borough boundary. There is no doubt that the ferry is a considerable convenience to the inhabitants of Fingrinhoe both for shopping, railway facilities, and for those of the inhabitants who work in Wivenhoe. To take one instance, the relator himself works in Wivenhoe, and he has a longer bicycle ride to get to Rowhedge than to get to the ferry in question and, using the ferry at the former place, he has further to bicycle when he gets on to the north bank.

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[20] (1870) L.R. 5 Ch. 525.

[21] [1931] 1 Ch. 121; 46 T.L.R. 554.

[22] [1938] Ch. 934; 54 T.L.R. 985; [1938] 3 All E.R. 367.

[23] [1915] 1 Ch. 235.

The corporation acquired the ferry from its former owner in the year 1899. I was told that the acquisition was due to the opinion of the corporation that if they owned it they would be able to make more favourable terms with some neighbouring landowner whose property they were considering acquiring. This matter was not gone into in any detail, and the reason why the corporation acquired the ferry seems to be immaterial for the present purposes. Whatever may have been the case in bygone days, it is quite obvious that in modern times the ferry is not extensively used. I was told that there were only four regular users of the ferry, and the number of passengers using it no doubt varies from day to day and from month to month. As many as 100 passengers have been known to use it on some days in the summer holiday season. The toll that has been charged for very many years has only been twopence, and this is quite insufficient to pay the wages of a ferryman. When the operation of the ferry was resumed after its discontinuance in March, 1953, the corporation employed a local firm of boat repairers in Wivenhoe to work it, and they apparently tried the expedient of running an hourly service. The receipts which they obtained from March to October were something under £45.

I need hardly say that this being an ancient ferry, the owner would not seem to be fulfilling his common law obligation if he ran such a restricted service. His duty, as I understand it, would be to have the ferry in operation at all hours, and to convey foot passengers across the river at any time that they required the facility. It may well be that they would be entitled to charge a higher toll now, owing to the fall in the value of money, and perhaps one still higher at night; indeed, it seems that the tolls charged did include one of one shilling for a doctor who might require it at night between 10 p.m. and 6 a.m. There was apparently a published schedule of tolls which, however, I need not deal with in detail. Figures were produced showing that the net loss to the corporation over five years preceding the closing of the ferry was £1,027 15s. 8d., and the corporation estimate that if they employed two men to work on a shift system the annual net loss to the corporation would be in the neighbourhood of £1,200 a year.

I had no evidence that the ferry was used at all extensively by the inhabitants of Wivenhoe, except at the fruit-picking season when farmers on the south bank hired pickers from the town, but as a franchise ferry it is open for all users of the highway. It does seem that, except at holiday times, there is no extensive use by anyone except the residents of Fingrinhoe, and not a great deal by them.

The judgment of Kindersley V.-C. in *Letton* v. *Goodden*[1] concisely states the nature of a ferry, the rights of the public and the obligations of the owner. He says[2]: "A ferry has been said "to be the continuation of a public highway across a river or "other water for the purpose of public traffic from the termina- "tion of the highway on the one side to its recommencement on "the other side; and as such the existence of a ferry is obviously "for the benefit of the public. The advantage to the public is so "great that the Crown has from time to time granted rights of "ferry, and all common ferries have their origin in royal grant, "or in prescription, which presumes such grant. Such a right "of ferry is an exclusive right or monopoly, and, as such, it is "in itself an evil, being in derogation of common right, for by "common right any person may carry passengers across a river. "But as a compensation for that derogation of common right, "there is this great advantage to the public, that they have at "all times at hand, by reason of the ferry, the means of travelling "on the King's highway, of which the ferry forms a part; for "the owner of the ferry is under the obligation of always pro- "viding proper boats, with competent boatmen, and all other "things necessary for the maintenance of the ferry in an efficient "state and condition for the use of the public; and this he is "bound to do under pain of indictment; and if he be found in "default, he would, as it is expressed, be liable to be grievously "amerced."

Now there is no doubt that an owner of a ferry who fails to perform his obligations to the public is liable to indictment, because the breach of a public duty is in general a misdemeanor. So the inhabitants of a parish are liable to be indicted if they fail to maintain a highway repairable by the inhabitants at large and, though modern legislation has provided more convenient methods of enforcing this duty, the liability to indictment still remains. Another consequence that may follow where the owner of a franchise fails in his duty is that he may be the subject of a scire facias at the suit of the Crown to repeal the franchise and, if thought necessary, to vest it in some other person: *Peter* v. *Kendal.*[3] Although this writ, which issues from the common law side of the Chancery formerly known as the Petty Bag Office, has been abolished for most purposes, it still remains for the calling into the Chancery of Crown grants and franchises for their cancellation, and would now be issued from the Crown Office. An example of pleading in a scire facias will be found in *Reg.* v. *Eastern Archipelago Co.*[4]

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[1] (1866) L.R. 2 Eq. 123.

[2] Ibid. 130.

But Mr. Binney contends, not unnaturally, that though these common law sanctions exist, they are of no advantage to those persons who are deprived of the service offered by the ferry. He contends that here equity must come to the aid of the law, and by its peculiar remedy of injunction compel the corporation, as the owner of the ferry, to render the service, and that at whatever cost to themselves. I ought perhaps to have mentioned that it seems that a person who has suffered special damage by a ferry owner's neglect to maintain it, has an action on the case against him (see *Paine* v. *Partrich* [5]), and while I have no desire to encourage litigation and to flood the Colchester county court with work, it may be (I say no more) that persons who, for the purpose of getting to Wivenhoe on their lawful occasions, are put to greater expense than they would have been had the ferry been in operation, can recover the difference in an action against the corporation.

So I have now to consider whether the court can, in accordance with established principles, grant a mandatory injunction to compel the corporation to work the ferry. There is no case to be found in the books of such an injunction ever having been granted, nor any hint or suggestion of there being such a remedy. As a ferry is a continuation of a road and so part of a highway (see *Letton* v. *Goodden* [6]) it is not inappropriate to consider whether an injunction has ever been granted to maintain a road.

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[3] (1827) 6 B. & C. 703.

[4] (1853) 1 E. & B. 310.

[5] (1691) Carth. 191; 1 Salk. 12.

[6] L.R. 2 Eq. 123.

Here again I can find no such instance. Moreover, the common law remedy of mandamus is in many respects closely akin to a mandatory injunction, and it was expressly held in *Reg.* v. *Trustees of the Oxford and Witney Turnpike Roads* [7] that the writ will not lie to enforce the repair of a road. This case was followed by Joyce J. in *Attorney-General* v. *Staffordshire County Council*,[8] when he refused a mandatory injunction ordering the defendants as the highway authority to do certain work necessary to maintain the road. No doubt cases are to be found where mandatory injunctions have been granted to do work in relation to roads, but these appear to be confined to cases where a nuisance has been created and the injunction is, in effect, to abate the nuisance. *Attorney-General* v. *Roe*,[9] cited by Mr. Binney, may be taken as an example. A landowner made an excavation adjoining a highway which was not only a danger, but caused a subsidence of the road. He was ordered to protect the excavation and restore the road, that is, in effect, to abate the nuisance which he had created.

Now it has been said more than once that it is not easy to be precise as to when equity will or will not grant a mandatory injunction—see, for instance, *per* Scrutton L.J. in *Kennard* v. *Cory Bros. & Co.*[10] Mr. Boreham contends that it is at any rate settled that the court will not grant injunctions requiring a person to perform personal services or to compel a company or an individual to do a continuous act which requires the continuous employment of people. Many cases were cited, but it is enough to refer to the judgment of Lord St. Leonards in *Lumley* v. *Wagner* [11] for the first proposition, and to *Powell Duffryn Steam Coal Co.* v. *Taff Vale Railway Co.*[12] for the second. It may be conceded that what are sometimes referred to as the railway cases form an exception. A leading example is *Greene* v. *West Cheshire Railway Co.*,[13] but these cases turn, in my opinion, on this principle; if a railway company or any other land-acquiring body acquire land for the consideration of a money payment, and a covenant to do certain work for the benefit of the person from whom they acquire it, if they take and keep the land they must do the work. But how can the court compel a person to maintain and work a ferry which would require him either to do the work himself, or maintain and pay ferrymen as his servants? It cannot, as it seems to me, make any difference whether the owner is a municipal corporation, a commercial company or an individual, nor whether the owner is rich or poor.

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[7] (1840) 12 Ad. & E. 427.
[8] [1905] 1 Ch. 336; 21 T.L.R. 139.
[9] [1915] 1 Ch. 235.
[10] [1922] 2 Ch. 1; 38 T.L.R. 489.
[11] (1852) 1 De G.M. & G. 604.
[12] (1874) L.R. 9 Ch. 331.
[13] (1871) L.R. 13 Eq. 44.

The duty to maintain and work the ferry is the same whatever the circumstances of the ferryowner. No authority has been quoted to show that an injunction will be granted enjoining a person to carry on a business, nor can I think that one ever would be, certainly not where the business is a losing concern. The franchise of a ferry is granted for the public benefit, and the public, by using it and paying the toll, enable the owner to maintain and work it and probably obtain a profit for his trouble. If it is so little used that it can only be maintained at a loss, it would seem to be inequitable to order the owner to continue working it, on pain of imprisonment if he is an individual, or sequestration if a corporate body, for the continued working of the ferry might force an individual into bankruptcy. It seems reasonable to assume in this case that if the franchise were forfeited no other person would be found willing to accept such a damnosa hereditas. I therefore refuse to grant an injunction.

Mr. Binney contended that he was at least entitled to a declaration. I do not see that any useful purpose would be achieved thereby, and the court is always loth to make a declaration where no consequential relief is granted. I cannot see that a bare declaration will be of any assistance to the relator or the other inhabitants of the village. Should the Attorney-General desire to proceed by scire facias, or should an indictment be preferred at the quarter sessions, the pleadings in this action can be used to prove that the ownership and the discontinuance were admitted by the defendants.

There remains the question of costs. Though the defendants have succeeded in resisting an injunction they are admittedly in default, and by their defence have afforded material which would appear to support an indictment and a scire facias. I think, therefore, that the proper result is that there will be judgment for the defendants without costs.

Judgment for defendants.

Solicitors: *Lawrence Jones & Co.; Sharpe, Pritchard & Co. for N. Catchpole, Colchester.*

E. M. W.

C. A.

1955
Mar. 23, 31.

Denning, Romer and Parker L.JJ.

LONDON COUNTY COUNCIL *v.* AGRICULTURAL FOOD PRODUCTS LD.
SAME *v.* VITAMINS LD.

Signature—Signature by proxy—Notice to quit—To be "signed by "valuer"—His name signed by assistant—Letters "p.p." omitted from signature—Proof of authority to proxy necessary.
Landlord and Tenant—Notice to quit.

Tenancy agreements made by the London County Council, as landlords, contained a clause to the effect that if the landlords desired to terminate the tenancy, it must be by "a written notice "signed by the valuer to the council." The landlords served notices to quit on the tenants on which the name of the valuer to the council appeared as signatory, but his name was written by an assistant valuer with nothing on the document to indicate that the signature was by proxy:—

Held that, since in general a person sufficiently "signs" a document if it is signed in his name and with his authority by somebody else, and there was nothing in the tenancy agreements to displace that common law rule, the notices were valid provided that the valuer authorized the signatures.

Per Denning L.J. In a normal case, when a formal document is required to be signed by a particular person, the signing can only be done by that person affixing his signature with his own hand. If the case is one where a signature by procuration is permissible, the person signing the document should add the letters "p.p." to show that it was signed by proxy, followed by his initials for the purpose of identifying himself.

Reg. v. *Kent Justices* (1873) L.R. 8 Q.B. 305; *France* v. *Dutton* [1891] 2 Q.B. 208 and *Goodman* v. *J. Eban Ld.* [1954] 1 Q.B. 550; [1954] 1 All E.R. 763 applied.

APPEALS from Judge Hargreaves sitting at West London County Court.

In these two cases, which were heard together, the London County Council, as landlords, sought to recover possession of premises let respectively to Agricultural Food Products Ld. and Vitamins Ld., in Beavor Lane, Hammersmith. The tenancy agreement in the second case (which, with one slight difference regarding the length of notice required, was in the same form as that in the first case) was made on March 18, 1940, by the London County Council by their valuer and agent Herbert Westwood. It contained a provision for determining the tenancy in the following terms: "The tenancy may be determined by three "months' notice to expire at any time after March 31, 1941. If "determined by the council it shall be by a written notice signed "by the valuer to the council and served on the tenants or left "for them upon the premises, or, if the same are unoccupied, "affixed to the premises three months at least prior to the day "of determination. If determined by the tenants it shall be by "a notice in writing and served upon the valuer or one of his "assistants at the offices of the council three months at least "prior to the day of determination. The notice in either case "may, instead of being served, be sent through the post by "registered letter addressed to the tenants at the premises or to "the valuer at the offices of the council as the case may be." The London County Council wished to obtain possession of both sets of premises in order to build a new arterial road across the sites. They accordingly sent a notice to quit to each of the tenants in similar terms except as to the length of notice given. The notice in the second case read as follows: "To Vitamins Ld. "On behalf of the landlords, the London County Council, I "hereby give you notice to quit and deliver up possession, on "Thursday the thirtieth day of September, 1954, of the "premises situate:—On the East Side of Beavor Lane, Hammersmith, London, W.6, which you now hold as a tenant of the "said council. Dated this 24th day of June, 1954. J. E. J. "Toole. Valuer and Agent of the London County Council."

In each case the signature of the valuer had been written by one of his assistants, a different one on each notice, and the tenants contended that, as the tenancy agreements required that the notices should be "signed by the valuer to the council" and they were not so signed, the notices were bad. The county court judge accepted this view and gave judgment for the defendants. The plaintiffs appealed.

Charles Fletcher Cooke for the plaintiffs. It is submitted that the notices to quit were signed, as required, by the valuer, since it is not necessary that a signature should be in the actual handwriting of the person required to sign a document. The valuer's signature having been written by one of his chief assistants, that constitutes a good signature by their principal, though it is agreed that had it been signed by the assistant in his own name it would not be a signature by the valuer. In *Reg.* v. *Kent Justices*[1] it was held that a notice of appeal to quarter sessions which was required by statute to be signed by the person giving it or by his attorney on his behalf was in order if it was signed in the

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[1] (1873) L.R. 8 Q.B. 305.

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appellant's name by the clerk to his attorney, with the appellant's authority. Blackburn J. said [2]: "No doubt at common law, "where a person authorizes another to sign for him, the signature "of the person so signing is the signature of the person autho-"rizing it; nevertheless there may be cases in which a statute "may require personal signature." In *Reg.* v. *Cowper* [3] Lord Esher M.R. (differing from Fry L.J.) held that the lithographed name of a solicitor on a form requiring the indorsement of his name was a sufficient compliance with the requirement. In *France* v. *Dutton* [4] it was held that a document directed to be signed by a solicitor was properly signed if it was signed in the name of the solicitor by his clerk in pursuance of a general authority for that purpose. The court held that the case fell within the decision of *Reg.* v. *Kent Justices* [5] and not that of *Reg.* v. *Cowper.*[6]

In *Goodman* v. *J. Eban Ld.*[7] (the rubber stamp case) the Court of Appeal (Denning L.J. dissenting) held that the requirement of section 65 (2) of the Solicitors Act, 1932—that a document should be signed by a solicitor—was complied with by the solicitor affixing to the document a facsimile of his business name in his handwriting impressed on it by a rubber stamp. In his judgment Romer L.J. approved of the statement in Stroud's Judicial Dictionary, 3rd ed., vol. 4, p. 2783, under the title "Signed; "signature" that "speaking generally, a signature is the writing, "or otherwise affixing, a person's name, or a mark to represent "his name, by himself or by his authority . . . with the intention "of authenticating a document as being that of, or as binding on, "the person whose name or mark is so written or affixed. . . ." That passage shows that a signature may be that of the man himself or made by his authority. In other words, the signature need not be in the handwriting of the man himself provided that there is authority in someone else to make it. In the present case there was no direct evidence of any authority having been given to the assistant valuers to sign, but since the London County Council are the owners of hundreds of properties it may be assumed that everything was properly done in relation to the granting of the necessary authority, and in case of doubt further evidence on that point could be produced.

Gerald Gardiner Q.C. and *Clive Wigram* for the tenants. In the county court no evidence regarding authority to sign in the name of the valuer was called, and it would be wrong to give the landlords an opportunity of calling further evidence now.

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[2] (1873) L.R. 8 Q.B. 305, 307.

[3] (1890) 24 Q.B.D. 533.

[4] [1891] 2 Q.B. 208.

[5] L.R. 8 Q.B. 305.

[6] 24 Q.B.D. 60, 533.

[7] [1954] 1 Q.B. 550; [1954] 1 All E.R. 763.

A signature of the valuer's name by an assistant of the valuer is not a signature by the valuer within the meaning of the tenancy agreements. It is not challenged that the London County Council would be entitled to sign tenancy agreements by an agent duly authorized, but the present case is one where someone else signs in the agent's name and the maxim delegatus non potest delegare applies: see *In re Prince Blucher.*[8] In *Rhodes* v. *Robinson*[9] it was held that a notice to quit given by an agent of a principal was not sufficient without recognition by the principal. The two questions are: (1) What is the proper construction to be placed on clause 6 of the agreement, and (2) under the clause, so construed, was a valid notice given? The London County Council in the agreement say that the only notice to quit which they will recognize is one signed by the valuer, but they are now contending that the tenants ought to have accepted a notice which was not signed by him. The county court judge was right, therefore, in holding that on the true construction of the contract the words "signed by the valuer" mean precisely what they say; and in any event the construction should be contra preferentes. Whatever the construction put on clause 6 may be, there was no evidence that the assistants who signed the name of the valuer had ever been given authority to do so either by the council or by the valuer himself.

Cur. adv. vult.

March 31. The following judgments were read.

DENNING L.J. stated the facts and continued: The defendants' point is short and simple. It is this: the agreements require that the notices should be "signed by the valuer to the "council." These notices were not signed by him. This point would not in the ordinary way trouble the London County Council very much because it could soon be remedied by serving fresh notices on which the valuer, Toole, had written his own signature. But we are told that the new Landlord and Tenant Act, 1954, has since come into operation and will give the tenants considerable security of tenure unless these notices are good. Hence the concern of the London County Council to show that they are

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[8] [1931] 2 Ch. 70; 47 T.L.R. 19.

[9] (1837) 3 Bing.N.C. 677.

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valid. They admit that Toole did not write his own name on either of the notices. They say that an assistant valuer did it in each case on his behalf, but they contend that this is a sufficient signature by him.

In the ordinary way, when a formal document is required to be "signed" by a person, it can only be done by that person himself writing his own name upon it, or affixing his own signature upon it with his own hand, see *Goodman* v. *J. Eban Ld.* [1]; but there are some cases where a man is allowed to sign by the hand of another who writes his name for him. Such a signature is called a signature by procuration, by proxy, "per pro.," or more shortly "p.p." All of these expressions are derived from the latin "per procurationem," which means by the action of another. A simple illustration is when a man has broken his arm and cannot write his own name. In that case he can get someone else to write his name for him; but the one who does the writing should add the letters "p.p." to show that it is done by proxy, followed by his initials to indicate who he is.

In the present case it is said that Toole signed by the hand of a proxy, the assistant valuer, but the proxy did not add the letters "p.p." In order to test the validity of the signature, we have first to inquire whether a signature by proxy was permissible at all; and secondly, if it was, whether the omission of the letters "p.p." was a fatal flaw.

On the wording of this tenancy agreement, I think that a signature by proxy was permissible on this notice to quit. Take the case where the tenants desire to determine the tenancy. The notice has to be in writing "signed by the tenants." But the tenant is a limited company which cannot write its own name. It can only sign by proxy, as, for instance, by a director or secretary signing on its behalf. Take next the case where the London County Council desire to give a notice to quit. The notice has to be a written notice "signed by the valuer to the council." The valuer is not designated by name, but by his office. The tenants might not even know his name. Valuers come and go without the tenants being any the wiser. The personality of the valuer does not come into it. In these circumstances I think that a signature by proxy is permissible. The valuer can get one of the assistant valuers to write his name for him: but the assistant should add the letters "p.p." to show that it is done by proxy, followed by his initials.

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[1] [1954] 1 Q.B. 550; [1954] 1 All E.R. 763.

The second question is more difficult. The assistant valuer did not add the letters "p.p." as he ought to have done. This is a bad practice because it is misleading. Anyone who did not know Toole's signature would think that he had himself signed the document. If it were not for authority, I should have thought that this was a fatal flaw. But there are two cases which show the contrary. In *Reg.* v. *Kent Justices* [2] and *France* v. *Dutton* [3] a clerk wrote the name of the principal, being duly authorized so to do, but did not add anything to show that it was done by proxy. Nevertheless the signature was held good. I do not think that we should disturb cases of such long standing; especially when section 91 (1) of the Bills of Exchange Act, 1882, proceeds on the same footing. That section says that: "Where, by this Act, any instrument or writing is required "to be signed by any person it is not necessary that he should "sign it with his own hand, but it is sufficient if his signature "is written thereon by some other person by or under his "authority." That Act is a codification Act, and is therefore a statutory recognition of the rule in *Reg.* v. *Kent Justices*.[4] Applying this rule, I think that the signature to this notice to quit should be held good so long as it was authorized by Toole.

No evidence was called at the trial to show that he authorized this signature: but this was because the judge ruled that Toole ought to have signed himself and that nothing short would suffice. Now that we think that an authorized signature will do, the London County Council should be given an opportunity of proving due authority. The appeals should be allowed and a new trial ordered in each case.

Romer L.J. (read by Parker L.J.). In each of these cases the plaintiff council could terminate the defendants' tenancies by serving on them "a written notice signed by the valuer to "the council." The notices which were in fact served, and upon which the council relies, were not signed by the valuer himself (J. E. J. Toole) but by one of his assistants, who signed, not in his own name, but in that of Toole; and the question before us is whether, upon the assumption that the assistant possessed the necessary authority so to sign, the defendants were bound to accept the notices as valid.

It is established, in my judgment, as a general proposition that at common law a person sufficiently "signs" a document if

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[2] (1873) L.R. 8 Q.B. 305.

[3] [1891] 2 Q.B. 208.

[4] L.R. 8 Q.B. 305.

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it is signed in his name and with his authority by somebody else; and in such case the agent's signature is treated as being that of his principal. That this is so was recognized by Blackburn J. in *Reg.* v. *Kent Justices*[4]; by Lord Esher in *Reg.* v. *Cowper*,[5] and by the Divisional Court in *France* v. *Dutton*.[6] The definition of "signature" in Stroud's Judicial Dictionary is also in conformity with the principle.

On the other hand if, by some rule of law, or by statute, a document has to be personally signed the duty of signing cannot be delegated to a third person (cf. *In re Prince Blucher*[7]); and the same result would follow if two parties agree that any document which one of them may serve upon the other under and by virtue of their contract is to bear his personal signature.

Inasmuch as there is no rule of law or statute which requires a notice to quit to be signed personally by a lessor it follows that the notices in question on these appeals were sufficiently signed by the valuer's agent (assuming due authority) unless it is to be gathered, on the true construction of the tenancy agreements as a whole, that they were intended by the parties to be signed by the valuer himself. The tenants contend that they were so intended and they rely on the provision in the agreements that if a tenant desires to determine his tenancy "it shall be by a "notice in writing signed by the tenant and served upon the "valuer or one of his assistants." The difference between this language and the earlier phrase "signed by the valuer to the "council" shows, it is argued, that a notice given by the council cannot be signed by one of the valuer's assistants, but must be signed by the valuer himself. This, of course, is true, and if the notices in dispute had been signed by the assistant in his own name they would doubtless have been invalid. This, however, is not what was done; for the assistant signed in the name of the valuer and, as I have already intimated, the signature is to be regarded as the valuer's own, provided that the assistant was authorized to affix it. There is no other context in the tenancy agreements which in any way tends to displace the common law rule and accordingly, in my judgment, the rule applies.

There remains the question whether the cases should be remitted to the county court in order to enable the council to prove that the assistant had due and proper authority to sign in the valuer's name. After some little hesitation I have arrived at the conclusion that they should. Although at an early stage of the hearing before the judge the defendants' counsel appears to have intimated in general terms that the defence to the actions was that the notices to quit were bad, I do not think that the plaintiffs had any sufficient warning of the real point which they had to meet. Notwithstanding their omission to ask for an adjournment, it appears to me on the whole that they should nevertheless have an opportunity of adducing, if they can, the requisite evidence to enable them to take advantage of the legal point which we have now decided in their favour. I therefore agree that the appeals should be allowed and that a new trial should be ordered in each case.

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[4] L.R. 8 Q.B. 305.

[5] (1890) 24 Q.B.D. 533; 6 T.L.R. 179.

[6] [1891] 2 Q.B. 208.

[7] [1931] 2 Ch. 70; 47 T.L.R. 19.

PARKER L.J. The definition of "Signed; signature" in Stroud's Judicial Dictionary, 3rd ed., vol. 4, p. 2783, is as follows: "(1) Speaking generally, a signature is the writing, or "otherwise affixing, a person's name, or a mark to represent "his name, by himself or by his authority . . . with the intention of authenticating a document as being that of, or as "binding on, the person whose name or mark is so written or "affixed. . . ."

As stated by Romer L.J. in *Goodman* v. *J. Eban Ld.*,[8] that statement appears to be in accord with the authorities. So far as the present case is concerned the relevant words are "by his "authority" and these words are in accord with what Blackburn J. said in *Reg.* v. *Kent Justices*,[9] namely: "No doubt at "common law, where a person authorizes another to sign for "him, the signature of the person so signing is the signature "of the person authorizing it; nevertheless there may be cases "in which a statute may require personal signature." This statement, moreover, was expressly approved by Lord Coleridge C.J. in *France* v. *Dutton*.[10] See also *per* Lord Esher M.R. in *Reg.* v. *Cowper*.[11]

There is much to be said for the view expressed by Denning L.J. in *Goodman* v. *J. Eban Ld.*,[12] where he said, "In "modern English usage, when a document is required to be "'signed by' someone, that means that he must write his name "with his own hand upon it." This view, however, was not shared by the majority of the court, who held that a rubber stamp bearing a solicitor's name, put on with his authority, was a good signature on a bill of costs. It is true that the question in that case was not "by whom, but how, the relevant document "must be 'signed,'" but it does show that the old common law rule still survives.

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[8] [1954] 1 Q.B. 550, 563.
[9] L.R. 8 Q.B. 305, 307.
[10] [1891] 2 Q.B. 208, 210.
[11] 24 Q.B.D. 533, 535.
[12] [1954] 1 Q.B. 550, 561.

That being so, the only question is whether the word "signed" in the context of the tenancy agreements requires a personal signature. It has always been recognized that certainly in some statutes the context may demand a personal signature (cf. *Hyde* v. *Johnson*[13]) and I conceive that even apart from statute the context is a matter to be taken into consideration. For myself, I can see nothing in the context here which requires an exception to be made to the common law rule. It is said that the notice to quit should bear the personal signature of the valuer, who in fact will have signed the tenancy agreement, for only thus will a tenant be able to know that the notice is valid. The valuer who has signed the agreement may, however, no longer occupy that position, as indeed was the case here. The emphasis is, I think, rather on the office or department of valuer and agent than on the man who occupies the office or department. That being so, I see no reason to depart from the common law rule.

Reliance was also placed on the later words in clause 6 of the agreements, "and served upon the valuer or one of his "assistants," but I do not find these words of any assistance. In the first place they are dealing with the question of service as opposed to signature, and, in the second place, even if the words had been "signed by the valuer or one of his assistants" it would not cover the present case since it was not a case of an assistant signing his own name, but the name of the valuer. Again, this is not within the principle of "delegatus non potest "delegare" since the assistant did not sign his own name. Indeed, the facts of this case are in this respect, assuming that there was authority, very like the facts in *Reg.* v. *Kent Justices.*[14]

The fact, however, remains that no authority to put the valuer's name on the notices to quit was proved. As to this, no defence was put in, but it appears that during the plaintiffs' counsel's opening, Mr. Wigram, for the defendants, stated that the only defence was that the notices were invalid. He did not, however, elaborate this by stating that he disputed the validity

[13] (1836) 2 Bing.N.C. 776.

[14] L.R. 8 Q.B. 305.

in law of anyone, other than the valuer, putting on the valuer's name and that, even if he were wrong in this, he required proof of actual authority to do so. In those circumstances I do not think that the plaintiffs can be penalized for not having asked for an adjournment in order to adduce evidence as to authority. In my opinion the appeals should be allowed, and a new trial ordered in each case.

Appeals allowed.
New trials ordered.

Solicitors: *J. G. Barr; Signy & Co.*

P. B. D.

BEVAN *v.* BEVAN.

[1953 B. No. 1977.]

1955
Mar. 23, 24, 25; *Apr.* 6.

Sellers J.

Trading with the Enemy—Husband and wife—Separation agreement—Husband agreed to pay wife monthly sum for maintenance—Wife voluntarily resident in enemy territory during the war—Instalments not paid—Whether contract abrogated at common law—Trading with the Enemy Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *ss.* 1, 7.
Husband and Wife—Maintenance.

By a separation agreement dated September 14, 1932, a husband agreed to pay to his wife £9 a month for her maintenance. The parties were both British subjects. At the outbreak of war, on September 3, 1939, the wife was voluntarily resident in Vienna and she remained so throughout the war. The husband paid the instalments until June 1, 1939, but not thereafter. The wife brought an action against her husband claiming the instalments due, alleging that, as they fell due, they should have been paid to the Custodian of Enemy Property, from whom she could subsequently have received them:—

Held that, in the circumstances, public policy did not require that the agreement should terminate on the outbreak of war, and therefore further performance of the contract was not abrogated at common law; accordingly, although the wife was an "enemy" within the Trading with the Enemy Act, 1939, while she remained in enemy territory, as the contract subsisted at common law the husband was subject to the provisions of section 7 of the Act, and the Orders made thereunder, which required him to pay the sums due to the Custodian of Enemy Property, and, as he had not done so, the wife was entitled to recover.

Schering Ld. v. *Stockholms Enskilda Bank Aktiebolag* [1946] A.C. 219; 62 T.L.R. 122; [1946] 1 All E.R. 36 and observations by Lord Greene M.R. in *In re Furness* [1944] 1 All E.R. 575 applied.

Arab Bank Ld. v. *Barclays Bank (Dominion, Colonial and Overseas)* [1954] A.C. 495; [1954] 2 All E.R. 226 considered.

ACTION.

On December 2, 1931, Jonathan Bevan, a British subject, married the plaintiff, Hildegard Angela Gisela Bevan, an Austrian by birth who thereby acquired, according to English law, her husband's nationality. By a separation agreement in writing dated September 14, 1932, the parties agreed: "1. The husband "and the wife hereby mutually agree that they will for the "future live apart from each other and that the wife shall be free "from the control of the husband and may live where she thinks "proper. 2. The husband agrees with the wife that he will pay "to her for her support and maintenance the monthly sum of "£9 during the joint lives of the husband and wife, such payments to be made to her on the first day of each month through "the National Provincial Bank Ld., at Hastings, or such other "bank as the husband may select. 3. The wife agrees with the "husband that she will out of the said allowances or otherwise "support and maintain herself and will indemnify the husband "against all debts to be incurred by her. 4. If the husband "and the wife shall at any future time come together and cohabit "or if their marriage shall be dissolved this agreement shall thereupon determine." The parties never came together again and the marriage had not been dissolved.

At the outbreak of war, on September 3, 1939, the wife was in Vienna, having moved there shortly before from Brazil. The husband paid the monthly instalments until June 1, 1939, but not thereafter. Three instalments totalling £27 were therefore due and unpaid when the war broke out, and were included in the wife's claim. Her substantial claim was that the further monthly instalments as they accrued should have been paid to the Custodian of Enemy Property, from whom, if that had been done, the wife could have received them. Since they were not paid to the custodian, the husband had been authorized by the custodian by letter, dated September 25, 1951, to hold at the disposal of his wife all moneys payable to her under the terms of the separation agreement free from the restrictions imposed by the Trading with the Enemy Act, 1939, and any orders made thereunder. By the Trading with the Enemy (Enemy Territory Cessation) (Austria) Order, 1952 (S.I. 1952, No. 1923), it was ordered that Austria should for all purposes of the Trading with the Enemy Act, 1939, and for the purposes of any order made thereunder, cease to be treated as if it were enemy territory as from November 5, 1952.

It was admitted at the trial that the wife was voluntarily resident in Vienna at the commencement of and throughout the war.

Frederick Hallis for the wife. It is conceded that the plaintiff was voluntarily resident in Vienna at the outbreak of war and that the separation agreement was an executory contract. It is submitted, first, that it was the duty of the defendant to pay the instalments under the separation agreement to the Custodian of Enemy Property as they fell due; secondly, that the custodian, by an authority in writing dated September 25, 1951, had authorized the defendant to hold all arrears and any future instalments at the plaintiff's disposal; and thirdly, that by the Trading with the Enemy (Enemy Territory Cessation) (Austria) Order, 1952 (S.I. 1952, No. 1923), payments to the plaintiff were freed from all restrictions, and as from November 5, 1952, the date of the Order, she was entitled to payments direct under the agreement.

The defences are, first, that the outbreak of war abrogated the agreement at common law; secondly, that the Trading with the Enemy Act, 1939, had the effect of putting an end to the agreement, by making further performance of it illegal; and thirdly, that the contract was frustrated by the outbreak of war because it was contrary to public policy.

(1) The agreement was not abrogated by the outbreak of war either at common law or by virtue of the Act of 1939. At common law a state of war does not avoid all contracts made between British subjects resident in the United Kingdom and enemies: Lord Porter in *Schering Ld.* v. *Stockholms Enskilda Bank Aktiebolag.*[1] The contract of marriage is not abrogated by the outbreak of war (*Fasbender* v. *Attorney-General* [2]), the reason being that it confers status on the parties to it and cannot be rescinded by the consent of the parties themselves: *per* Lord Penzance in *Mordaunt* v. *Mordaunt.*[3] Status means the relationship of an individual to the community at large which arises, not by virtue of the act of that individual but by virtue of the law declaring that status or relationship. Marriage is a contract which survives

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[1] [1946] A.C. 219, 265; 62 T.L.R. 122; [1946] 1 All E.R. 36.

[2] [1922] 2 Ch. 850, 858; 38 T.L.R. 852.

[3] (1870) L.R. 2 P. & M. 109, 126.

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war and the status of each party conferred by law by virtue of the marriage continues to subsist.

A separation agreement is a contract affecting or modifying the status of married parties: *Niboyet* v. *Niboyet*,[4] in which Brett L.J. said: "That relation between the parties, and that "status of each of them with regard to the community, which "are constituted upon marriage are not imposed or defined by "contract or by agreement but by law." It is submitted that under a separation agreement each party has conferred on him or her by law a peculiar status, and that is reinforced by the language of Shearman J. in *Roe* v. *Roe*,[5] where he speaks of the status conferred by a separation agreement. Such an agreement can affect the status of a husband and wife in the strict sense of the word status in a number of respects: (1) Where a husband and wife are living apart under a separation agreement they are disabled from claiming the relief which the court would otherwise grant for wilful desertion. A separation agreement is also a bar to a claim for restitution of conjugal rights. (2) Clause 1 of the separation agreement affects all other persons in the community by preventing the husband from complaining of anyone harbouring the wife, as in *Place* v. *Searle*.[6] (3) By reason of the agreement the wife cannot apply for maintenance unless she can show that her circumstances have changed: *Dowell* v. *Dowell*.[7] A separation agreement such as that in the present case, although it is not conclusive, will have a cogent effect on the wife's right to say that her husband is guilty of wilful neglect to maintain her. (4) The husband's position vis-à-vis the rest of the community is altered in the matter of his liability for his wife's necessaries. So long as the parties are living together there is a presumption that the wife has the husband's authority to pledge his credit: Lush on Husband and Wife, 4th ed., p. 321; where they live apart under a separation agreement there is no such presumption: Lush, p. 338. (5) A separation agreement may affect the children of the marriage and may result in one or other of the parties not being entitled to the care of the children.

A separation agreement should be treated as dealing pro tanto with the concomitants of the rights of married status by analogy to "the concomitants of rights of property" referred to by Lord

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[4] (1878) 4 P.D. 1, 11.

[5] [1916] P. 163, 164; 32 T.L.R. 490.

[6] [1932] 2 K.B. 497; 48 T.L.R. 428.

[7] [1952] W.N. 296; [1952] 2 All E.R. 141.

Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[8] That expression was approved in *Schering's* case.[9] Concomitant rights of property are unaffected by the outbreak of war; a contract of marriage, as a contract of status, is unaffected by war; similarly, it is submitted that the concomitants of rights of status remain unaffected and that any agreement which affects, modifies or has a bearing on that unaffected status of marriage is equally unaffected by the outbreak of war. If the reverse were correct, it would mean the restoration of the full status of marriage, and would be contrary to public interest because the law does not interfere with separation agreements but enforces them.

(2) With regard to the Trading with the Enemy Act, 1939, that Act does not abrogate or rescind contracts which come within its scope. It does not make an enemy of a person who is not an enemy at common law: *per* Lord Greene M.R. in *N. V. Gebr Van Udens Scheepvaart en Agentuur Maatschappij* v. *Sovfracht*,[10] which was overruled in the House of Lords [11] but on a different point. The Act, while prohibiting dealings with defined classes of persons, provides for the collection of accrued debts and also for debts accruing during the war under pre-war contracts. The combined result of the subsistence of the separation agreement at common law and under the Act of 1939 and the Orders made thereunder is, (i) instalments payable under the agreement were debts which became payable as they became due under paragraph 1 (ii) (*e*) of the Trading with the Enemy (Custodian) Order, 1939 (S.R. & O. 1939, No. 1198); (ii) under the Act of 1939 the custodian had power to transfer those moneys; and (iii) in any event as from November 5, 1952, by virtue of the Trading with the Enemy (Enemy Territory Cessation) (Austria) Order of that date, the plaintiff became fully restored to her rights to direct payment under the agreement, on the assumption that the agreement had not been abrogated.

The effect of the Act of 1939, per se, was not to make this contract illegal and thenceforth void, because the Act does not make void that which would not be void at common law; it contemplates that monetary obligations under contracts will be paid to the custodian with the proviso that the persons entitled to them should have them after the war. If the contract subsists then the procedure is clearly laid down.

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[8] [1918] A.C. 260, 269; 34 T.L.R. 208.

[9] [1946] A.C. 219.

[10] [1942] 1 K.B. 222, 229; 58 T.L.R. 60; [1941] 3 All E.R. 419.

[11] Sub nom. *Sovfracht (V/O)* v. *Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr.)* [1943] A.C. 203; 59 T.L.R. 101; [1943] 1 All E.R. 76.

(3) The defence of frustration means that "The further fulfil-"ment of . . . [a contract] has been brought to an abrupt stop "by an irresistible extraneous cause for which neither party is "responsible" (*per* Lord Macmillan in *Denny, Mott & Dickson Ld.* v. *James B. Fraser & Co. Ld.*[12]), and the contract will then be terminated forthwith. There are three theories regarding frustration: (a) the implied term theory stated by Lord Loreburn in *F. A. Tamplin Steamship Co. Ld.* v. *Anglo-Mexican Petroleum Products Co. Ld.*[13]; (b) the disappearance of the foundation of the agreement, which is Lord Haldane's theory [14] in the same case, applied by Goddard J. in *W. J. Tatem Ld.* v. *Gamboa*[15]; and (c) the court's imposition of a just and reasonable solution in view of all the circumstances, which is Lord Wright's theory propounded in the *Denny, Mott* case.[16]

The doctrine of frustration has no application to the present case for the following reasons: (1) One is here dealing with a contract affecting status; if it were to be held that it was frustrated, it would result in bringing the husband and wife together contrary to their intentions. (2) No question of impossibility of performance within the meaning of that phrase in the doctrine of frustration arises here because the Order of 1939 has provided the machinery by which the husband can fulfil his monetary obligations by paying the instalments to the custodian. (3) With reference to the three theories, (a) the parties would never have agreed such a term; (b) the foundation of this contract is the contract of marriage and the agreement to live apart; the payment of maintenance is only part of the consideration for the agreement to live apart, performance of which was possible through the custodian; (c) the application of Lord Wright's theory is not a matter of fact but a question of law for the court. Lord Wright in the *Denny, Mott* case [17] said: "The data for decision "are, on the one hand, the terms and construction of the con-"tract, read in the light of the then existing circumstances, and "on the other hand the events which have occurred." Regarding the first data, the contract speaks for itself, for the wife may live where she thinks fit and may live apart from her husband who has his settled obligation to maintain her, and that covenant can be performed by payment to the custodian. Regarding the second data, the money could not be sent to her, but statutory provisions were made for its payment with release to her thereafter. Looking at what is just and reasonable the wife should be able to collect the arrears. Accordingly, the doctrine of frustration has no application to this case because the contract is a contract of status.

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[12] [1944] A.C. 265, 272; 60 T.L.R. 419; [1944] 1 All E.R. 678.

[13] [1916] 2 A.C. 397, 403; 32 T.L.R. 677.

[14] [1916] 2 A.C. 397, 406, 407.

[15] [1939] 1 K.B. 132, 139; [1938] 3 All E.R. 135.

[16] [1944] A.C. 265, 274.

[17] [1944] A.C. 265, 274.

There is nothing in carrying out the agreement by payment to the custodian which would offend against public policy.

Lastly, on the question of suspension, the operation of a contract which is interfered with by the outbreak of war involves looking at the contract to see whether it is the type of contract which the parties would, if they had contemplated war, think should be suspended: Sir Arnold McNair on The Legal Effects of War, 3rd ed., p. 98.

If the contract were to be held to be one which was suspended, it should come into force again at the end of the war, first, because the agreement provided that it was for the joint lives of the parties, and secondly, because clause 4 expressly provided the only two grounds on which the agreement should terminate.

On the authorities it appears that a separation agreement is not severable and is to be construed as a whole: *Vansittart* v. *Vansittart*,[18] in which Lord Chelmsford L.C. said that a deed is capable of severance, an agreement is not.

Norman J. Skelhorn Q.C. and *N. R. Blaker* for the husband. The question whether the separation agreement was abrogated by the outbreak of war has to be decided as at the outbreak of war and having regard to the position under the contract at that time. The agreement was at that time an executory contract, performance of which would involve intercourse with, and would be for the benefit of, an enemy. Unless, therefore, the plaintiff can bring herself within the class of executory contracts which are exempted from abrogation, this agreement is abrogated. The principles on which a contract is abrogated are set out in the *Ertel Bieber* case[19]; although the type of contracts dealt with in that case were trading contracts, the basic reasons given by Lord Dunedin apply to the present case. The prohibition of intercourse with an enemy is not confined to commercial intercourse; it extends to all intercourse which could tend to be an advantage to an enemy: *Robson* v. *Premier Oil and Pipe Line Co. Ld.*[20]

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[18] (1858) 2 De G. & J. 249, 255.

[19] [1918] A.C. 260.

[20] [1915] 2 Ch. 124; 31 T.L.R. 420.

For the purpose of abrogation, the fact that the plaintiff is a wife matters not; the only thing that matters is that she is an enemy. If she receives £9 a month, that is a benefit; if £9 a month is sent to her through a bank, that is communicating with an enemy, and on grounds of public policy is a type of intercourse with an enemy which is prohibited on the outbreak of war. It is not, it is true, contrary to public policy for a husband to pay a wife maintenance, but for a man to pay maintenance to an "enemy," albeit his wife, who is voluntarily resident in enemy territory is against public policy.

The trading with the enemy legislation did not provide for performance of contracts abrogated by war. Performance of this contract was prohibited by section 1 (2) (*a*) (ii) and (iii) of the Act of 1939 and thereby made illegal, unless saved by the proviso, which is not applicable. If the rights under the agreement were not accrued rights, then performance of the contract contravened the Act. As Lord Goddard C.J. said in *Schering's* case,[21] nothing in the Act revived debts or obligations which had gone. This legislation provided for payment to the Custodian of Enemy Property of moneys payable under contracts which survived the outbreak of war, e.g., accrued debts and contracts relating to rights in property. Payment to the custodian cannot for this purpose be substituted for performance of the contract. He is not paid the money as the agent of the "enemy." He holds the money independently to be dealt with eventually in accordance with arrangements to be made by the Board of Trade (see paragraph 3 of the Order of 1939), and the "enemy" may ultimately be paid none of it, and in any event there will be deducted the percentage payable to the custodian in accordance with the Order.

Unless, therefore, the present agreement came within one of the exceptions to the general rule, it was abrogated on the outbreak of war. *Schering's* case [22] decided that payment by instalments of an accrued debt came within the exception. *Arab Bank Ld.* v. *Barclays Bank (D.C.O.)* [23] decided that a credit balance on a current account payable on demand was also an accrued right within the meaning of the exception. There could be no question of an accrued debt in the present case. There was no obligation to pay any particular month's £9 until the first day of that month and, further, the plaintiff had to continue to be alive before there was any liability to pay the money. If the plaintiff were right then the money might be paid over monthly even if she were dead, because there was no means of discovering, save by intercourse with an enemy, whether she was alive or dead.

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[21] [1946] A.C. 219, 269.

[22] [1946] A.C. 219.

[23] [1954] A.C. 495; [1954] 2 All E.R. 226.

Reference should be made to *In re Furness*,[24] because it may be said that the Court of Appeal there decided that payments in a case such as the present were payable to the custodian. The question of abrogation does not appear, however, to have been argued in that case and, further, the deed there in question may well have been a settlement of property so as to come within the exception.

With regard to the argument that the agreement survived because it affected the status of the parties, a separation agreement does not affect " status " at all. The illustrations that were given only show that a separation agreement affects the rights of the parties and does no more. If the result of a separation agreement were that the wife was no longer a married woman but had a new status of a " separated spouse " with a new set of rights, the position might be different. A separation agreement evidentially negatives desertion because it shows consent, but the plaintiff had the same status before and after the separation agreement so far as the community was concerned.

There is no foundation for the submission that the provision of a separation agreement cannot be severed. Even if the proposition were correct it would help the defendant's submission since, if the valid part cannot be severed from the invalid, the whole agreement is unenforceable. Conditions in separation deeds are essentially independent: *Fearon* v. *Earl of Aylesford*.[25] The real point in *Vansittart* v. *Vansittart*[26] is that Lord Chelmsford L.C. was there saying that the consideration in the case of an agreement to enter into a deed is one specific consideration and a person will not be forced to enter into a different deed. One has to look to see whether there is one entire consideration or whether there is a severable consideration. [Reference was made to *Kuenigl* v. *Donnersmarck*.[27]]

Although this is a separation agreement the same principles with regard to frustration apply as to an ordinary commercial contract. [Reference was made to *Pardy* v. *Pardy*[28] and *Hyman* v. *Hyman*, *Hughes* v. *Hughes*.[29]] In *Tomkins* v. *Tomkins*[30] there

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[24] [1944] 1 All E.R. 575.

[25] (1884) 14 Q.B.D. 792; 1 T.L.R. 68.

[26] 2 De G. & J. 249.

[27] [1955] 2 W.L.R. 82; [1955] 1 All E.R. 46.

[28] [1939] P. 288; 55 T.L.R. 1037; [1939] 3 All E.R. 779.

[29] [1929] P. 1; 44 T.L.R. 664.

[30] [1948] P. 170; 64 T.L.R. 106; [1948] 1 All E.R. 237.

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is a statement which at first sight appears to suggest that the doctrine of frustration has no application to separation agreements, but what Lord Greene M.R. was really saying was that questions of frustration did not affect the particular jurisdiction there being exercised, namely, the statutory jurisdiction of the court to vary settlements. Even if the plaintiff were right that payment to the custodian would have been a method of performance, that would still have been a frustration of this agreement which is essentially a maintenance contract. It is the essence of this agreement, not that payment should be made to some official who was to hold it for some indefinite time, but that it should remain legal and possible to make payments in such a way as would enable the wife to use them for her maintenance. The observations of Lord Wright in *Joseph Constantine Steamship Line Ld.* v. *Imperial Smelting Corporation Ld.*[31] apply to the present case. He emphasizes that frustration takes effect by operation of law and not by desire of the parties.

[SELLERS J. What does justice demand? I am just taking a phrase, but it is the background of all these cases.]

Justice demands that where parties contract on a particular basis and that basis goes, then the contract should go. In most cases it is advantageous to one side, but justice does not cease to demand it because it is less advantageous to one side than to the other. The latest statement of the principle of frustration is to be found in *British Movietonews Ld.* v. *London and District Cinemas Ld.*[32]

[SELLERS J. It is very hard to find what the implied term is—it is more likely to be that if the husband cannot pay the wife direct, some arrangement should be made to accumulate.]

It might equally well be that the husband would say that if his wife chose to stay in enemy territory the agreement would be terminated. One can well imagine the husband agreeing to pay £9 a month only so long as it was legal for him to do so. Once that basis of legality goes then the contract must be frustrated.

The question of mere suspension does not arise. That is only to be considered where one is dealing with accrued rights. If performance became illegal for an indefinite period, such as the duration of a war, this would result in frustration of the contract: see *Horlock* v. *Beal.*[33]

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[31] [1942] A.C. 154, 183, 186; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[32] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

[33] [1916] 1 A.C. 486; 32 T.L.R. 251.

Hallis in reply. The submission that payment to the custodian would not have constituted payment under the agreement because once the money was paid to the custodian the plaintiff would have no interest in it is contrary to the authority of *Bank Voor Handel en Scheepvaart N.V.* v. *Slatford*,[34] in which Evershed M.R. refers to rights being in statutory suspense. Although the case was overruled in the House of Lords,[35] his remarks were approved. Accordingly, the wife would have had a contingent beneficial interest in the moneys paid to the custodian. The whole purpose of the office of custodian is that he shall be paid money which must not be transmitted to the enemy. It is not suggested that if the obligation to pay a sum of money were extinguished at common law the Act of 1939 or the Order would nevertheless make that money payable to the custodian. The point is that the contract was not rescinded at common law.

The plaintiff's right under the separation agreement is a chose in action the survival of which is contemplated in the definition in section 7 (8) (*b*) of the Act. An example of an accrued debt which is not invalidated under the Act of 1939 is to be found in *Schering's* case.[36] The declaration of the validity of the debt certainly involved something for the benefit of the enemy, who could assign it or charge it. The Act of 1939 makes payment to the enemy unlawful, but does not otherwise invalidate or declare unlawful any contract. It does not make the obligation to pay unlawful, nor does it say that such obligation is discharged; it merely prohibits performance of any contract in so far as such performance involves trading within the meaning of section 1. If that were not so, the Act would have the effect of extinguishing liability for an accrued debt.

The invalidity or abrogation of a contract by reason of outbreak of war will depend on one or other of two considerations: if the further performance of the agreement does not involve, first, trading within the meaning of section 1 of the Act, and secondly, intercourse within the common law meaning, then such further performance will not be illegal.

It was argued for the defendant, first, that payment to the custodian instead of to the plaintiff was not fulfilment of the contract, and secondly, that payment years afterwards was not fulfilment of the covenant to pay each month. Payment to the custodian would be a complete answer if the wife thereafter claimed from the husband. There was plenty of room in this contract for the implied term that in the event of war the husband should pay these instalments to the custodian. If the second point were correct anyone might meet a claim for arrears by such an argument. The plaintiff was not bound to support herself out of the monthly payments; she could support herself if she wished and save the money.

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[34] [1953] 1 Q.B. 248, 279; [1952] 2 T.L.R. 861; [1952] 2 All E.R. 956.

[35] Sub nom. *Bank Voor Handel en Scheepvaart N.V.* v. *Administrator of Hungarian Property* [1954] A.C. 584; [1954] 1 All E.R. 969.

[36] [1946] A.C. 219.

The only possible intercourse which the performance of this contract could involve was the transmission of money, and that would not and could not arise by virtue of the required payment to the custodian.

The case of a separation agreement such as the present is in all essentials similar to the position under an executed contract where all that remains is to pay the accrued debt by instalments as in the *Schering* case.[37] There is no material distinction between an accrued debt and accruing instalments. [Reference was also made to *Halsey* v. *Lowenfeld*[38] and *Seligman* v. *Eagle Insurance Co.*[39]]

Skelhorn Q.C. *Tucker* v. *Tucker*[40] contains some observations on the question of status.

Cur. adv. vult.

April 6. SELLERS J. read the following judgment: The question for consideration in this case is whether, in the circumstances existing at the outbreak of war on September 3, 1939, between Great Britain and Germany (then incorporating Austria), the separation agreement was put an end to by the state of war and the respective obligations of the parties under it terminated, in particular the husband's obligation to pay the moneys monthly for the support of his wife.

[His Lordship stated the facts as set out above, and continued:] The sole question is whether the agreement has subsisted so that any money was payable thereunder after the outbreak of war. If it has subsisted, it is conceded that the husband is liable for the accumulated arrears less income tax thereon.

It was contended on behalf of the husband that (1) the outbreak of war abrogated the agreement under the common law of this country as the wife was and remained in enemy territory and was and remained an enemy, that further performance of the agreement would have involved intercourse with the enemy and would have been for the benefit of an enemy, and that the continuance or further performance of the agreement became illegal and contrary to public policy; (2) the Trading with the Enemy Act, 1939, made further performance illegal and therefore put an end to the agreement, and (3) the agreement, in the circumstances, became impossible of performance without any fault on the husband's part and was frustrated.

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[37] [1946] A.C. 219.

[38] [1916] 2 K.B. 707; 32 T.L.R. 709.

[39] [1917] 1 Ch. 519.

[40] [1949] P. 105; 64 T.L.R. 613.

At the bar it was not contended that the contract was executed. It was accepted that it was executory, by which I understand the parties to mean not that it was wholly unperformed but that there remained something to be done on both sides. The wife's obligation to live apart and the husband's obligation to leave his wife free from his control continued up to the war and the impact of the war in the circumstances tended to enforce those obligations by the necessity of the situation. There was nothing actively to be done by the wife unless it was to communicate to her husband, for the forwarding of the monthly maintenance, any change from the address in Vienna which she had given him before the war broke out, or possibly to give a receipt for moneys received. It remained for the husband to make the payment each month as it fell due and to do this his bankers would have had to transmit the £9 monthly to the bank in Vienna named by the wife. No doubt this would have involved a degree of intercourse and there was the benefit to the wife as an enemy of £9 a month, which could only be the barest maintenance. The money was only payable during their joint lives but up to the war the wife had not been required to establish each month that she was still living. It had been taken for granted and the money had been sent (except for the last three instalments) and the obligation to pay could well have continued on the same understanding.

Those are, as I see them, the features and characteristics of the contract under consideration. One is tempted to say outright that a simple insignificant contract of this character, designed to provide a very modest monthly subsistence allowance by a British subject to his wife while they were living apart and which in its ordinary performance would require the slightest formal communication by his bank to hers, could hardly be said to be against public policy and, therefore, ended for all time, with the strange result that the war removed the contractual obligation to live apart and at the same time made it very difficult for them to do otherwise.

As the question appears to come before the courts for the first time, and there must have been many separation agreements in 1914 and perhaps more in 1939, it would seem improbable that the aggregate of any payments under such agreements would have been of great benefit financially to any country. But authority is against that attitude. Sir Arnold McNair, in his work on The Legal Effects of War, 3rd ed., at p. 84, discusses the matter and quotes Lord Porter's observations in *Sovfracht V/O* v. *Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr.)*[1]: "'The question, however, whether a given act is against public "'policy must, I think, be decided on general principles. It "'is not permissible to say that a particular act will not in "'fact assist the enemy. The proper inquiry is whether that "'act is of a class which is likely to assist him, and it is "'immaterial to ascertain whether in the individual case he may "'or may not be found to profit from it.'"

It is necessary, therefore, to consider the law and I take first the position at common law. This has been stated and summarized in recent cases which have reviewed the authorities. I take one extract from Lord Porter's speech in *Schering Ld.* v. *Stockholms Enskilda Bank Aktiebolag*[2]: "It is, no doubt, gener-"ally true that the further performance of contracts made before "the outbreak of war and not fully performed on either side is "prohibited as contrary to public policy provided that such "performance involves intercourse with an enemy or benefits "him. For the sake of brevity I speak of this result as abrogation "of the contract though the contract itself is not abrogated, but "further performance alone forbidden. There are however, "exceptions and limitations upon this doctrine. So far at any "rate as concerns benefit to the enemy, the further performance "of contracts which have been completely performed on one side "and in which all that remains is payment by the other are "suspended, not dissolved, and in the same category are to be "placed certain contracts particularly those which are really "concomitants of the rights of property though still executory: "see *per* Lord Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co.* "*Ld.*[3] In each case therefore before deciding whether a contract "is abrogated or merely suspended on the outbreak of war it is "essential to determine its exact construction and effect."

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[1] [1943] A.C. 203, 251; 59 T.L.R. 101; [1943] 1 All E.R. 76.

[2] [1946] A.C. 219, 258; 62 T.L.R. 122; [1946] 1 All E.R. 36.

[3] [1918] A.C. 260, 269; 34 T.L.R. 208.

In *Arab Bank Ld.* v. *Barclays Bank (D.C.O.)*[4] Lord Morton of Henryton took two passages from Lord Dunedin's speech in the *Ertel Bieber* case[5] as correctly stating the common law: "Lord "Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co. Ld.*[5] stated "the common law of England as to trading with the enemy as "follows:—'My Lords, the proposition of law on which the judg-"'ment of the courts is based is that a state of war between this "'kingdom and another country abrogates and puts an end to all "'executory contracts which for their further performance require, "'as it is often phrased, commercial intercourse between the one "'contracting party, subject of the King, and the other contract-"'ing party, an alien enemy, or anyone voluntarily residing in the "'enemy country. I use the expression "often phrased commer-"'"cial intercourse" because I think the word "intercourse" is "'sufficient without the epithet "commercial." As to this I "'agree with the judgment of the Court of Appeal in the case of "'*Robson* v. *Premier Oil and Pipe Line Co. Ld.*,[6] where Pickford "'L.J., delivering the judgment of the court, Lord Cozens-Hardy "'M.R., himself and Warrington L.J., said: "The prohibition "'"of intercourse with alien enemies rests upon public policy, "'"and we can see no ground either on principle or authority for "'"holding that a transaction between an alien enemy and a "'"British subject which might result in detriment to this "'"country or advantage to the enemy is permissible because it "'"cannot be brought within the definition of a commercial "'"transaction." That so expressed it is an incontrovertible "'proposition admits, I think, upon the authorities, of no "'doubt.'"

"Lord Dunedin went on to point out that there are certain "exceptions to the general rule. He said[7]: 'There is indeed no "'such general proposition as that a state of war avoids all "'contracts between subjects and enemies. Accrued rights are "'not affected though the right of suing in respect thereof is "'suspended. Further, there are certain contracts, particularly "'those which are really the concomitants of rights of property, "'which even so far as executory are not abrogated. Such as, "'for instance, the contract between landlord and tenant, of "'which an example may be found in the recent case of *Halsey*

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[4] [1954] A.C. 495, 523; [1954] 2 All E.R. 226.

[5] [1918] A.C. 260, 267–8.

[6] [1915] 2 Ch. 124, 136; 31 T.L.R. 420.

[7] [1918] A.C. 260, 269.

" ' v. *Lowenfeld.*[8] In other words, the executory contract which " ' is abrogated must either involve intercourse, or its continued " ' existence must be in some other way against public policy as " ' that has been laid down in decided cases.' "

It was argued for the husband that this was a clear case where further performance of the contract would involve intercourse with the enemy and was for the benefit of an enemy as the wife was a resident in enemy territory, and therefore the contract was abrogated. For the wife it was submitted that the facts of this case made it an exception to the general rule as it was closely analogous in principle to those contracts which are really " the " concomitants of rights of property, which even so far as executory are not abrogated," to use Lord Dunedin's phrase in the *Ertel Bieber* case,[9] or to the payment of a debt by instalments as in the *Schering* case,[10] where the instalments fell due for payment after the war had commenced and the war did not abrogate or discharge the debt.

In support of the first submission by the wife it was argued that the contract of marriage is not affected by war: McNair on The Legal Effects of War, pp. 100, 101; *Fasbender* v. *Attorney-General.*[11] Marriage is not affected because it is a contract creating a status and the status continued; and reliance was placed on the definition of " status " by Brett L.J. in *Niboyet* v. *Niboyet*[12]: " Marriage is the fulfilment of a contract satisfied by the solem" nization of the marriage, but marriage directly it exists creates " by law a relation between the parties and what is called a " status of each. The status of an individual, used as a legal " term, means the legal position of the individual in or with " regard to the rest of a community. That relation between " the parties, and that status of each of them with regard to the " community, which are constituted upon marriage are not " imposed or defined by contract or agreement but by law."

A separation agreement, it was argued, was a contract affecting or modifying the status of the married parties and was, therefore, a concomitant of status and should avoid abrogation by war, as do payments under a lease or it may be under a settlement by deed. In *Roe* v. *Roe*[13] Shearman J. used this expression: " Having " separated by consent, if the document or contract under which " they so separated comes to an end, then from the moment when

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[8] [1916] 2 K.B. 707; 32 T.L.R. 709.

[9] [1918] A.C. 260, 269.

[10] [1946] A.C. 219.

[11] [1922] 2 Ch. 850; 38 T.L.R. 852.

[12] (1878) 4 P.D. 1, 11.

[13] [1916] P. 163, 164.

"it comes to an end . . . the status conferred by it comes to an "end also", and from that it was submitted that the separation agreement established a status of marriage modified by the several disabilities which the contract created; the inability to claim relief in the courts for desertion, the husband's inability to complain if anyone harboured his wife, restrictions on the wife's right to proceed for maintenance on grounds of wilful neglect to maintain, and alteration in the husband's common law relationship with the rest of the community as regards his liability for his wife's necessaries. I doubt whether Shearman J. intended the word "status" as so used to have any technical meaning. The parties to this agreement have remained husband and wife throughout and have retained their marriage status. The agreement has not deprived them of any right or obligation of that status but it may afford evidence that rights have not been infringed and that obligations have been performed. It may be difficult to regard the spouses as having a modified status, but the payment does arise out of the husband's obligation to maintain his wife where she has committed no matrimonial offence and is, therefore, quite different from a trading contract, which is the kind of contract most frequently held to be abrogated in the cases, although it has been authoritatively held that contracts other than commercial contracts may be abrogated by war.

In *Robson* v. *Premier Oil and Pipe Line Co. Ld.*[14] the judgment of Pickford L.J. from which Lord Dunedin quoted in the *Ertel Bieber* case,[15] contained also this passage: "We do not "think it necessary to decide whether the principle extends to "intercourse, if such there be, which could not possibly tend to "detriment to this country or to advantage to the enemy; it is "enough to say that in our opinion all intercourse which could "tend to such detriment or advantage, whether commercial or "not, is, to use the language of the learned judge before mentioned, inconsistent with the state of war between the two "countries and therefore forbidden."

It is difficult to conjecture any executory contract which would not require for its further performance at least an address, receipt or acknowledgment from the party in enemy territory. If the husband had given his wife some real property in this country or some shares in an English company which produced £9 a month, then the wife's right would have been preserved. No such

[14] [1915] 2 Ch. 124, 136; 31 T.L.R. 420.

[15] [1918] A.C. 260.

permanent provision was made, perhaps for the reason that the husband had not the means so to do or that he contemplated his wife's early return to him. These are all considerations which indicate some injustice if the further performance of this contract is held to be abrogated but the exigencies of war may involve many injustices and the question is whether in the public interest the contract is one which the law has stigmatized, or should stigmatize, as being against public policy.

I turn now to consider *Schering's* case,[16] where the contract was held not to be abrogated by war. Nothing remained to be done under the contract but to discharge an accrued debt by instalments. The debt had accrued before the outbreak of war but the payments of the majority of the instalments were outstanding and the fifth of 14 instalments fell due on October 28, 1939. It was held that as all that remained to be done was to discharge an accrued debt by instalments the war did not abrogate or discharge a debt incurred before the declaration.

The *Schering* case [16] was closely analysed in the course of the speech of Lord Morton of Henryton in *Arab Bank Ld.* v. *Barclays Bank (D.C.O.)*,[17] and was referred to and applied by other members of the House. Lord Morton said [18]: "In the "*Schering* case [19] there was no existing right of action to recover "the remaining instalments, for these instalments had not yet "become payable; yet this House held that the right to receive "these instalments when they fell due was a right which survived "the outbreak of war. Having regard to this decision, I do not "think that the right which was vested in the appellants at the "outbreak of war can be held to have been destroyed merely "because no action could be brought to recover it without a "previous demand. I am content, without elaborating the matter "further in words of my own, to adopt the reasoning of Jenkins "L.J.[20] when he said, speaking of the *Schering* case [21]: 'If, as "'was recognized in the case just cited, a debt contracted before "'the outbreak of war, but made payable by instalments on "'dates occurring after such outbreak, is not abrogated by such "'outbreak, but merely suspended as regards enforcement, and "'this notwithstanding the right of the debtor to an acknow-"'ledgment, and transfer of a security, upon the payment of "'each instalment, I fail to see why it should be held that a

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[16] [1946] A.C. 219.
[17] [1954] A.C. 495.
[18] Ibid. 528.
[19] [1946] A.C. 219.
[20] [1953] 2 Q.B. 527, 569; [1953] 2 All E.R. 263.
[21] [1946] A.C. 219.

"'debt contracted before the outbreak of war should be cancelled "'merely because it is payable on demand. By parity of reasoning a credit balance kept by an enemy with a bank in this "'country on terms that it was to be payable against production "'of a passbook or deposit receipt would be cancelled by the "'outbreak of war. Once the exception of accrued rights is "'accepted, and once the basis of it, viz., that the law in its "'concern to prevent benefit to enemies does not go the length of "'confiscating enemy property, is recognized, I see no reason in "'principle or common sense why a debt for the recovery of "'which some formality, such as a demand for payment or "'the production of some indicia of title, is made requisite, "'should on that ground be excluded from the benefit of the "'exception.'"

The differences between the *Schering* case,[22] where the debt had accrued and where a contrary decision would have meant confiscation of proprietary rights and the present case do not seem from the point of view of public security and public policy in time of war so cogent as the similarities. That which would have been involved in communication with the enemy in the payment of the instalments there and the monthly instalments here appear to be almost identical. Lord Reid[23] observes that the preservation of debts from abrogation is to some extent anomalous, and he quotes a passage from Lord Goddard's speech in the *Schering* case,[24] which points out that the differences between abrogation and non-abrogation are not always logical. Lord Morton refused to attempt the task of formulating an exhaustive description of the rights which do and the rights which do not survive the outbreak of war. The courts have, I think, throughout dealt with each case as it has arisen and viewed it from the standpoint of public policy rather than rigid precedent or rule.

In my judgment, public policy did not require that this contract should terminate on the outbreak of war. It continued to exist and statutory provisions required the husband to make his payments after the war had started to the Custodian of Enemy Property.

Although the case came before the court on a different issue, the observations of Lord Greene M.R. in *In re Furness*[25] lend support, I think, to the view I have expressed. The succeeding

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[22] [1946] A.C. 219.

[23] [1954] A.C. 495, 533.

[24] [1946] A.C. 219, 269.

[25] [1944] 1 All E.R. 575, 578.

Lord Furness was attempting to enforce a forfeiture clause in a settlement made by the late Lord Furness in favour of his wife. At the outbreak of war and up to the death of Lord Furness they were both living in the South of France, an area which became enemy territory on July 10, 1940. Lord Furness died on October 6, 1940. The Master of the Rolls said [25]: "So far as the instal-"ments payable between July 10, 1940, and the date when Lady "Furness on her return to England ceased to be an enemy for "the purposes of the Trading with the Enemy Act are concerned, "admittedly, on the basis that there was no forfeiture, they are "payable to the custodian."

Secondly, the husband relies on the Trading with the Enemy Act, 1939. The wife was admittedly an "enemy" within the Act so long as she remained in Austria or other enemy territory but her agreement with her husband could have been equally well performed by her quitting there for England or a neutral country, for it was agreed that she might live where she thought proper. I accept Mr. Skelhorn's submission that the Trading with the Enemy Act and the rules thereunder would not revive a contract abrogated by the outbreak of war or provide for any performance of it. But I have found that the contract subsisted at common law and if that is so it is not defeated by the Act of 1939. The Act prohibited certain dealings and made provision for the collection of enemy debts and the custody of enemy property. I do not think I need develop this further. It was not disputed that if the contract subsisted the husband should have paid the instalments when due each month to the Custodian of Enemy Property.

Neither need I deal at any length with the third defence, that the contract was frustrated. If I am right in the views I have already expressed, then clearly the contract was not frustrated even if it ever was the kind of bargain to which the doctrine could be applied. The House of Lords, in *British Movietonews Ld.* v. *London and District Cinemas Ld.*,[26] expressed, it would seem, a preference for Lord Simon L.C.'s view in *Constantine's* case [27] as to the basis on which the doctrine of frustration is founded. That is stated in *Joseph Constantine Steamship Line Ld.* v. *Imperial Smelting Corporation Ld.*,[27] in the course of which Lord Simon L.C. said: "The most satisfactory basis, I "think, on which the doctrine can be put is that it depends

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[25] [1944] 1 All E.R. 575, 578.

[26] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

[27] [1942] A.C. 154, 163; 57 T.L.R. 485; [1941] 2 All E.R. 165.

"on an implied term in the contract of the parties." Later he said[28]: "Every case in this branch of the law can be stated as "turning on the question whether from the express terms of the "particular contract a further term should be implied which, "when its conditions are fulfilled, puts an end to the contract."

I am inclined to think it would be a wild conjecture to frame the term which the parties or an officious informed bystander would have inserted into this contract to deal with the situation of war arising between the respective countries or territories in which the parties were at the time respectively residing, but it could be hazarded that the obligation to live apart would continue and that the monthly instalments be paid to the custodian, from whom the wife would have some hope of retrieving them in time. It seems hardly likely that the husband would be released from his financial obligations by this fortuitous event.

In my judgment, the husband has no defence to this claim, although it may seem burdensome to him if he has not put on one side the instalments as they fell due, for the total has grown to a large figure. I give judgment for the wife, and the precise amount after the appropriate tax has been deducted must be calculated.

Judgment for the wife.

Solicitors: *Buckeridge & Braune; Bartlett & Gluckstein.*

C. J. E.

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[28] [1942] A.C. 154, 164.

REGINA *v.* DRISCOLL.

C. C. A.

1955
Apr. 4.

Lord Goddard C.J., Ormerod and Gorman JJ.

Criminal Law—Sentence—Supervision order—Committal for non-payment of a fine—Whether a sentence of imprisonment—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 22 (1) (*a*).

A committal to prison in default of payment of a fine, is not a conviction which can be taken into account under section 22 (1) (*a*)[1] of the Criminal Justice Act, 1948, for the purpose of imposing a supervision order under that section, for it is not a "sentence" of imprisonment within the meaning of the section.

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[1] Criminal Justice Act, 1948, s. 22: "(1) Where a person is convicted on indictment of an offence "punishable with imprisonment for "a term of two years or more, and "that person—(*a*) has been convicted "on at least two previous occasions "of offences for which he was sentenced to Borstal training or "imprisonment . . . the court, if it "sentences him to a term of imprisonment of twelve months or more,

APPEAL against sentence.

The appellant, Gerald Edmund Arthur Driscoll, was convicted at West London Magistrates' Court of three offences of larceny as a bailee and one offence of obtaining goods by false pretences. He was committed for sentence under section 29 of the Magistrates' Courts Act, 1952, to the County of London Sessions. On October 10, 1954, at the London Sessions two previous convictions were proved against the appellant, namely, obtaining credit by fraud, for which he had been sentenced to 12 months' imprisonment, and certain Customs offences for which he had been ordered to pay a fine and to undergo a term of three months' imprisonment in default of payment. The full amount of the fine was not paid and the appellant, accordingly, spent some time in prison in respect of the unpaid balance. On the proving of those two convictions the appellant was sentenced to three years' imprisonment and a supervision order was made pursuant to section 22 of the Criminal Justice Act, 1948.

On January 12, 1955, the appellant applied for leave to appeal against sentence. He was not represented on the application. The application was dismissed, but on the registrar pointing out that an order had been made under section 22 of the Act of 1948, the court subsequently gave leave to appeal to hear argument on the question whether a committal to prison for non-payment of a fine was a sentence of imprisonment for the purposes of section 22 (1).

S. A. Morton for the appellant. The supervision order ought not to have been made. Section 22 of the Act of 1948 requires that the prisoner shall have been convicted on at least two previous occasions and "sentenced to Borstal training or imprisonment." A committal to prison for non-payment of a fine is not a sentence of imprisonment for the purposes of section 22 (1). Accordingly, on the appellant's record, he has not been twice sentenced to imprisonment.

The definition section of the Act, section 80, states: "'Impose "'imprisonment' means pass a sentence of imprisonment or "commit to prison in default of payment of any sum of money

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"shall, unless having regard to the "circumstances, including the character of the offender, it otherwise "determines, order that he shall for "a period of twelve months from his "next discharge from prison be "subject to the provisions of [section "29 of the Prison Act, 1952]."

"or for failing to do or abstain from doing anything required to "be done or left undone." But the words "impose imprisonment" do not appear in section 22; they appear only in sections 17, 18 and 19 and, therefore, that definition cannot be imported into section 22. Section 80 also contains a definition of the word "sentence," and the section expressly provides that "'sentence' . . . does not include a committal in default of "payment of any sum of money . . . ," which expression must include payment of a fine. That contention is supported by a perusal of sections 1 and 41 of the Criminal Justice Administration Act, 1914. It is to be noted that section 41 provides that the expression "sentenced to imprisonment" shall include cases where imprisonment is imposed by a court in respect of the "non-payment of any sum of money," which expression must include non-payment of a fine: see also section 1 of that Act. The definition of "sentenced to imprisonment" in section 41 of the Act of 1914 is quite different from the definition of "sentence" in section 80 of the Act of 1948, and it follows, therefore, that the expression "sentenced to imprisonment" in section 41 of the Act of 1914 expressly *includes* committal for non-payment of a fine, while the expression "sentence" in section 80 of the Act of 1948 expressly *excludes* it. Further, the expression "impose "imprisonment" in section 80 does not refer to section 22. Accordingly, the supervision order should not have been made. [Reference was also made to section 1 of the Money Payments (Justices' Procedure) Act, 1935.]

J. C. Phipps for the Crown. It is conceded that the argument put forward on behalf of the appellant is correct. If in fact committal to prison for non-payment of a fine were to be a "sentence "of imprisonment" within the meaning of the Criminal Justice Act, 1948, it would follow that there would be a right of appeal against that "sentence" by virtue of section 36 of the Act, but it has never been suggested that such a right of appeal exists.

LORD GODDARD C.J. stated the facts, referred to section 22 (1) (*a*) of the Criminal Justice Act, 1948, and continued: The appellant was sentenced to three years' imprisonment at the London Sessions when two previous convictions were proved against him. One was the offence of obtaining credit by fraud, for which he was sentenced to 12 months, and no question arises. The other was a conviction in respect of certain Customs offences for which he was ordered to pay a fine and undergo imprisonment in default of payment. The question for determination is whether imprisonment in default of payment of a fine is a sentence of imprisonment within the meaning of section 22 (1) (*a*). For this purpose it is necessary to refer to the definition section, section 80 of the Act, which provides: "'Impose imprisonment' means pass a sentence of "imprisonment or commit to prison in default of payment of any "sum of money or for failing to do or abstain from doing anything "required to be done or left undone." If that section were applicable, the question would be free from doubt, but the words "impose imprisonment" do not appear in section 22. They appear only in sections 17, 18 and 19, to which I need not for this purpose refer. The definition section also contains a definition of the word "sentence": "'Sentence' includes an "order for detention in a detention centre, an order for custody "in a remand home under section 54 of the Children and Young "Persons Act, 1933, and an order sending an offender to an "approved school, but does not include a committal in default of "payment of any sum of money. . . ."

It is arguable that the words "payment of any sum of money" refer only to the power of justices to make orders for payment of sums of money, as, for instance, maintenance orders and various other orders which a magistrates' court can in the exercise of what I may call civil jurisdiction order a man to pay, and to commit him to prison if he does not pay. Parents are sometimes ordered to pay sums of money for the maintenance of their children when they are sent to approved schools. The most common committal order made in a magistrates' court is a committal order in respect of maintenance which has not been paid by a man for the maintenance of his wife. But on full consideration, especially a consideration of the relevant provisions of the Criminal Justice Administration Act, 1914, to which Mr. Morton has called attention, the court is of opinion that the view it took on the former application, though without formally deciding it, was wrong, and that "payment of any sum of money" does include payment of a fine.

Section 1 of the Criminal Justice Administration Act, 1914, concerns the effect of non-payment of fines, and it was that Act which, for the first time, introduced into the criminal law the obligation to give a person time to pay a fine unless there were special circumstances why that course should not be taken. Section 1 of that Act provides: "(1) A warrant committing a "person to prison in respect of non-payment of a sum adjudged "to be paid by a conviction of a court of summary jurisdiction "shall not be issued forthwith unless the court which passed "the sentence is satisfied" of certain matters. In that section there occurs the expression "in respect of non-payment of a sum "adjudged to be paid by a conviction of a court of summary "jurisdiction," and a fine is a sum which is adjudged to be paid by a court of summary jurisdiction or any other court. It is true that when one turns to section 41 of the Act it is provided: "For the purposes of this Act, unless the context otherwise "requires—(1) The expression 'sentenced to imprisonment' shall "include cases where imprisonment is imposed by a court on any "person either with or without the option of a fine, or in respect "of the non-payment of any sum of money. . . ." The definition contained in that section is distinguishing no doubt between a committal for non-payment of a fine and committal for non-payment of any sum of money, but that definition of "sentenced "to imprisonment" is quite different from the definition in section 80 of the Criminal Justice Act, 1948, of "sentence" or "impose imprisonment."

The Director of Public Prosecutions has appeared in this case, and counsel on his behalf has submitted to the court that the argument Mr. Morton has put forward is right. Accordingly, we decide that where there has been a committal in default of payment of a fine, that is not a conviction which can be taken into account under section 22 (1) (*a*) for the purpose of imposing an order under that section. The matter does not arise under section 21, that is, the proof of convictions for corrective training. It is unnecessary to deal with any matter connected with preventive detention; the present decision is confined to the making of an order under section 22 (1), and we point out that it does not affect the convictions under that part of section 21 which deals with corrective training. To this extent the appeal is allowed, so that the order made under section 22 will be set aside.

Appeal allowed in part.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

J. A. G.

1955
Jan. 11.

Gerrard J.

C. A.

1955
April 4, 5, 22.

Denning and Parker L.JJ. and Roxburgh J.

In re A SOLICITOR.

In re A TAXATION OF COSTS.

Solicitor—Costs—Lump or gross sum charge—"Contentious" business — "Non-contentious" business — Client's petition for judicial separation prepared—Change of solicitor before filing of petition —Whether first solicitor entitled to submit lump or gross sum bill—Whether matters contained in bill wholly non-contentious— Solicitors' Remuneration Order, 1953 (*S.I.* 1953, *No.* 117 (*L.*1)), *Sch.* 2.

A client instructed solicitors in her matrimonial affairs and they carried out work on her behalf up to and including the preparation and engrossment of a petition for judicial separation. Before the petition was filed she terminated their retainer and instructed other solicitors. The first solicitors delivered to the client a lump sum bill for their work:—

Held (by the Court of Appeal) (1) that, to distinguish between contentious and non-contentious business, regard must be had to the nature of the business done and not to the time when it is performed. If work done before a writ is issued is of such a nature that if the case went for trial the costs in respect of it would properly be allowed on a party and party taxation, then it is contentious business even if a writ is not in fact issued, but if the work would not be so allowed then it is non-contentious.

(2) That under the Solicitors' Remuneration Order, 1953, a solicitor may still deliver a bill of costs consisting of a lump sum charge in relation to non-contentious matters, provided that it contains a summarized statement of the work done sufficient to tell the client what it is for which he is asked to pay, but if contentious matters are included with non-contentious, the bill is bad and the solicitor may be ordered to deliver a separate bill with detailed items and charges in respect of the contentious business.

(3) That, in the present case, part of the business was of a contentious nature and, therefore, two separate bills should have been presented.

Decision of Gerrard J. affirmed.

Summons adjourned into open court.

The facts, which are stated in detail in the judgment of Gerrard J., were briefly as follows: In March, 1953, a client who was previously resident in South Africa consulted a firm of solicitors concerning her matrimonial affairs. The solicitors advised her, amongst other matters, on questions of domicile, the custody of her children and maintenance from her husband, and took a proof of evidence of her matrimonial life. They obtained counsel's opinion on the question of domicile, attended a conference with counsel on the question of jurisdiction, instructed counsel to draft a petition for judicial separation, instructed inquiry agents on the client's behalf, instructed counsel to redraft the petition and generally acted in the preparation of her case. On June 14, before the petition was filed, the client terminated her retainer and instructed other solicitors.

The second solicitors received the papers in the case from the first solicitors and then negotiated with the husband's solicitors until December, 1953, when negotiations broke down. On December 23, 1953, her petition, for the most part as drafted by counsel instructed by the first solicitors, was filed, and on December 26, 1953, it was served on the husband.

On September 3, 1953, the first solicitors delivered to the client a lump sum bill for their costs. The bill was very detailed but not itemized. An itemized bill of costs was requested and refused, and the client thereupon issued a summons for an order that the first solicitors should deliver a detailed bill of their fees, charges and disbursements. On December 16, 1953, the master ordered them to deliver a bill of costs.

The solicitors appealed.

Sir Hartley Shawcross Q.C. and *Colin Duncan* for the appellants.

Maurice Lyell Q.C. for the respondent.

Cur. adv. vult.

Jan. 11. Gerrard J. read the following judgment: The client and her husband lived in South Africa for some years until February, 1953, when, because of difficulties which had arisen between them, she left that country. She arrived in England towards the end of the next month, and almost immediately sought the advice of the solicitors, to whom I shall refer as the first solicitors, about her matrimonial troubles. They advised her that it would be in her interest to have ready a petition for judicial separation, so that in the event of her deciding to institute proceedings, it could be filed at short notice and served upon the husband on one of his periodical visits to this country.

The first solicitors took a proof of evidence from the client, employed inquiry agents to watch the husband, and consulted counsel. On June 3, 1953, counsel settled a draft petition praying for a judicial separation, the custody of the children of the marriage, alimony pending suit, and permanent alimony for the client and the children. That draft petition was based upon certain allegations of cruelty. After the client had, with the first solicitors, considered counsel's draft, it was decided that certain amendments were necessary. On July 9, 1953, counsel redrafted the petition. In the redraft, certain allegations of adultery, based in part on the agents' inquiry, were added. The client approved the redraft, and the document was engrossed by the first solicitors in order that proceedings might be launched at any moment if the client gave instructions for that to be done. At the same time the first solicitors were advising the client upon offers of financial provision made to her on her husband's behalf.

On July 14, 1953, she decided to terminate the retainer of the first solicitors, and retained another firm of solicitors, to whom I shall refer as the second solicitors. They conducted negotiations with the husband's advisers with regard to financial provision for the client and also employed inquiry agents to watch the husband. In December, 1953, the client decided to file the petition for judicial separation. The engrossment of the amended draft petition settled by counsel was treated as a draft and considered by the client under the guidance of the second solicitors. Very minor alterations were made in three of the first 28 paragraphs, and a further allegation of adultery alleged to have taken place in London in October, 1953, was added. The prayer was amended by praying for the discretion of the court to be exercised in the client's favour.

The petition in its final form was filed on December 23, 1953; service was effected on the husband on December 26, 1953, when he was visiting this country. The husband entered appearance under protest, objecting to the jurisdiction of the court. I understand that recently the question of jurisdiction was decided in the client's favour. On September 3, 1953, the first solicitors delivered to the client a document containing a very detailed description of the work they had done on her behalf. The document contained a statement of their disbursements. It was not an itemized bill of costs in the traditional form; it was a lump sum bill which the first solicitors maintained complies with the Solicitors' Remuneration Order, 1953. The client was advised by the second solicitors to challenge the first solicitors' right to present a bill in that form, and in due course sought and obtained on December 16, 1953, an order from Master Harwood that the first solicitors should deliver a bill of costs.

The first solicitors appealed from this order and the appeal came before me on February 10, 1954, for the first time. I was asked to decide two points: (1) whether, having regard to the Solicitors' Remuneration Order, 1953, the document was a good bill, and (2) whether, having regard to that Order, the court could compel the delivery of a traditional itemized bill of costs. At the hearing of the appeal I was not asked to consider the terms of the document of September 3, 1953; I was asked to treat the matter on the agreed footing that its contents related solely to non-contentious business, falling within the Solicitors' Remuneration Order, 1953, which solely concerns that form of business.

After hearing argument upon that agreed footing, I was about to deliver judgment in chambers in favour of the first solicitors when I was asked by Sir Hartley Shawcross, who appeared on their behalf, if I would reserve judgment and deliver it in court, so that the matter might be reported, as the first solicitors and the Law Society, who were interested in the matter, regarded the case as of great importance to all solicitors. I agreed to adopt this course. When I had prepared my judgment on the agreed footing, my attention was drawn to some of the work described in the document of September 3, 1953. It occurred to me as at any rate possible that some of the business to which the document refers was not non-contentious business, and if that were so, my judgment would be given on a wrong, though agreed, basis. This was a situation which I did not relish, and I asked the parties to appear before me again. I informed counsel that although I had not come to any conclusion about the matter, I did not think it was by any means certain that the agreed basis was correct. I then learned for the first time that a petition had in fact been filed shortly after the hearing before the master. After some discussion between counsel, it was agreed that I should be furnished with the history of the case on affidavit, and that I should be asked to consider whether the whole of the business to which the document of September 3, 1953, related was in fact non-contentious business, it being conceded that if any part was not, the document could not come within the Solicitors' Remuneration Order, 1953. I heard the argument on this part of the case on November 24, 1954. I was asked to agree, and rightly or wrongly I did agree, that I would include in my judgment, whatever the result of the appeal, my reasons for the conclusion which I had already indicated, namely, that, assuming the whole of the business referred to in the document of September 3, 1953, to be non-contentious business, the document would be a good bill, and the order of the master could not be supported.

I think it would be convenient if I give those reasons first. The decision of the matter involves a consideration of Solicitors' Remuneration Orders before that of 1953. I have to start with the Order of 1883, but because of the assumption I am making in this part of my judgment, I need not refer to the parts of the Order defining the business it covers; I can go straight to paragraph 2 (*c*). I ought to mention here, to avoid confusion, that nobody seems quite sure whether it is right to call the Order the Order of 1883 or 1882. It is in fact called by both titles. Paragraph 2 (*c*) of the Order reads: "In respect of "business not herein-before provided for, connected with any "transaction, the remuneration for which, if completed, is "herein-before, or in Schedule 1 hereto, prescribed, but which "is not, in fact, completed, and in respect of settlements, mining "leases or licences, or agreements therefor, re-conveyances, "transfers of mortgage, or further charges, not provided for "herein-before or in Schedule 1 hereto, assignments of leases "not by way of purchase or mortgage, and in respect of all other "deeds or documents, and of all other business the remuneration "for which is not here-before, or in Schedule 1 hereto prescribed, "the remuneration is to be regulated according to the present "system as altered by Schedule II hereto." I draw attention to the words "according to the present system." They relate to traditional detailed solicitors' charges. Schedule 2 reads thus: "Such fees for instructions as, having regard to the care and "labour required, the number of and length of the papers to be "perused, and the other circumstances, as to drawing etc., the "allowance shall be . . . ."

The Solicitors' Remuneration Act General Order, 1920, is the next material Order, but I need not quote from it because it was, with variations not material to the present issue, re-enacted by the Solicitors' Remuneration (Gross Sum) Order, 1934. That Order provides as follows: "Without prejudice to the power "possessed by the Court under the Solicitors Act, 1932, or otherwise or to the powers conferred upon the solicitor or the party "chargeable with the bill under section 66 of the Solicitors Act, "1932, the remuneration of a solicitor in respect of all business "regulated by clause 2 (*c*) of the General Order of 1882 as "amended by any subsequent General Order may at the option "of the solicitor be by a gross sum in lieu of by detailed charges: "Provided that within six months after delivery of a charge "made under this Order, whether it has been paid or not the "client may require that a detailed bill of charges shall be "delivered and the solicitor shall thereupon comply with the "requisition and any bill so delivered shall be subject to taxa-"tion as if the provisions of this Order with respect to the "regulation of remuneration by gross sum had not been made."

The significant features of the Orders of 1920 and 1934 are (1) a charge by gross sum may be made; (2) the client may, within a limited time, require that a detailed bill of charges shall be delivered, and that any bill so delivered shall be subject to taxation in the ordinary way as if no gross sum charge were permissible.

The Order of 1934 was revoked by the Solicitors' Remuneration Order, 1953, in which, by paragraph 2, for the words "according to the present system as altered by Schedule 2 "hereto" contained in paragraph 2 (*c*) of the Order of 1883 there were substituted the words "in accordance with Schedule 2 "hereto."

It is contended on behalf of the first solicitors that this new schedule is intended to make two significant changes in the law with regard to solicitors' remuneration for non-contentious business.

The first is that a solicitors' remuneration is to be such sum as may be fair and reasonable having regard to all the circumstances of the case and, in particular, to certain criteria laid down in the schedule. It is, I think, clear that in relation to business within the scope of Schedule 2 the principles of remuneration have changed and the schedule has substituted a more realistic method of ascertaining what the work done is really worth. About the substitution of these new principles of remuneration there is indeed no issue.

It is with regard to the second alleged change that the dispute arises. It is contended for the first solicitors that although Schedule 2 of the Order of 1953 makes no specific reference to charging by way of a gross or lump sum and revokes the Solicitors' Remuneration (Gross Sum) Order, 1934, it still enables a solicitor to deliver a lump sum bill in relation to business within its scope, and that in place of the protection given to the client by the Orders of 1920 and 1934, under which he could call for a detailed bill of charges and have it taxed, a new method of protecting the client who receives a lump sum bill has been provided by the Order of 1953.

In Schedule 2 of the Order of 1882 reference is made to "fees." In Schedule 2 of the Order of 1953 appear the words "such sum," "the sum charged," "a fair and reasonable sum," "the sum so certified" and "the reasonableness of his charge." It seems to me that these words clearly visualize the charging of a lump sum.

The arguments put forward on behalf of the client were, as I understand them, these: prior to the Solicitors' Remuneration Act General Order, 1920, it was a fundamental principle that a bill had to be in a form which would enable the client to take it to an independent solicitor and obtain advice upon it; as it was put in *Duffett* v. *McEvoy*,[1] to "enable the party to judge of the "goodness of the items." It was argued that although the gross sum Orders of 1920 and 1934 gave a right to a solicitor to charge by a lump sum, the fundamental principle was preserved because the client could, at his option, require a detailed bill of charges, and if, upon advice, he was not satisfied of the goodness of the charges, he could have the bill taxed. It is said that the client now is not given by the Order of 1953 any express right to require the delivery of a detailed bill, and as there are no express words giving a solicitor a right to charge by way of a lump sum, the wording of the Order is not sufficiently strong to allow a lump sum charge to be made or to take away the ancient right of a client to have a detailed bill, and that therefore the document of September 3, 1953, is not a good bill.

Now it is true that Schedule 2 of the Order of 1953 does not enable the client to call for a detailed bill. It would be a very odd thing if the Order were intended to deprive a solicitor of a right which he has enjoyed since 1920; but the mere oddity of that situation is not the test of the effect of the Order. I think it is clear that, taking the schedule as a whole, the "present "system" referred to in the Order of 1883 has plainly been replaced by a new system, and the new system involves a liberty to charge by way of a lump sum and gives a new form of protection to the client, the sufficiency of which can only be judged in the course of time. The right of the client to have the bill taxed is not affected, and the client may require the solicitor to obtain a certificate from The Law Society certifying that the sum charged is fair and reasonable, or, if it is not, what is a fair and reasonable sum, and the sum so certified, if less than that charged, shall, in the absence of taxation, be the sum payable. Further, before the solicitor brings proceedings to recover costs on his bill, he must, unless the costs have been taxed, have drawn the attention of the client in writing to his right to require the solicitor to obtain such a certificate from The Law Society as I have mentioned and to the provisions of the Solicitors Acts, 1932–1950, with regard to taxation of costs; and, if the taxing master allows less than one-half of the amount charged, he shall bring the facts of the case to the attention of The Law Society. It seems to me that the Order of 1953 has not deprived a solicitor of the right to make a lump sum charge, and that its object is to effect what one may perhaps call a further "modernising" of solicitors' charges in a process which began with the gross sum Order of 1920. On any taxation of a bill delivered under Schedule 2 of the Order of 1953, the taxing master will no doubt require evidence to satisfy himself that the charge of the solicitors is fair and reasonable, and will not, I imagine, be hampered by the absence of a long traditional itemized bill of costs. The solicitor may be hampered if he has not kept careful records of the work done. Therefore, if the business for which the first solicitors seek to charge in the document of September 3, 1953, is wholly non-contentious business, the order of the master cannot, in my view, be supported.

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[1] (1885) 10 App.Cas. 300.

I now turn to the second aspect of the matter. As I have indicated, it is submitted on behalf of the client that the document of September 3, 1953, relates in part to contentious business, and it is common ground that if that submission is correct, the first solicitors have not delivered a "good bill" under the Order of 1953.

In order to discover the sorts of business to which that Order relates it is necessary to go back to the Solicitors' Remuneration Act of 1881. It is entitled "An Act for making better provision "respecting the remuneration of solicitors in conveyancing and "other non-contentious business."

By section 2, certain persons were empowered to make General Orders prescribing and regulating the remuneration of solicitors in respect of certain classes of business. After setting out the persons entitled to make Orders, the section states: ". . . may from time to time make any such General Order "as to them seems fit for prescribing and regulating the "remuneration of solicitors in respect of business connected with "sales, purchases, leases, mortgages, settlements, and other "matters of conveyancing, and in respect of other business not "being business in any action, or transacted in any court, or in "the chambers of any judge or master, and not being otherwise "contentious business. . . ." There follow words which give power to revoke or alter any Orders that are made. Those classes may be briefly described as (a) business connected with matters of conveyancing, and (b) all other business of a non-contentious nature. The business comprised in class (b) appears to me to consist of two kinds: (1) business which is not business in any action or transacted in any court or in the chambers of any judge or master, and (2) other business which is not for any other reason contentious business.

In *In re The Merchant Taylors' Co.*[2] Cotton L.J. used these words[3]: "Under the Act I think it clear that what was meant "was business other than conveyancing business, not being "business in chambers or other contentious business." Clearly the section confined the power to make Orders to the regulation of remuneration for those sorts of business the nature of which is defined by eliminating every kind of contentious business.

It is convenient next to consider the Orders made under the section. The first was that of 1882, or as it is sometimes called the Order of 1883. Paragraph 2 of the Order does not exactly copy the wording of section 2 of the Act: it omits the words "and not being otherwise contentious business." This seems to me a curious state of affairs. It is only in paragraph 4 of the Order that there is a reference to contentious business, and that is in order to provide that the prescribed remuneration for matters of conveyancing business is not to include any business of a contentious character or any proceedings in any court.

What is the effect, if any, of the omission from the Order of the words in section 2 of the Act? If one looks only at the Order, ignoring matters of conveyancing, there would appear to be one test of whether business falls within paragraph 2: is the work done business in any action or transacted in the court of any judge or master? If it is, it does not fall within the Order; if it does not, then it does. This hardly seems to keep in line with the power to make Orders given by section 2, and it is not consistent with that part of paragraph 4 of the Order to which I have referred. The words there used, like section 2 of the Act, clearly visualize business of a contentious character outside as well as inside proceedings in a court.

The words of the Order cannot govern the Act, but the Act does govern the Order. I cannot hold that what is not business in an action or transacted in any court or in the chambers of any judge or master must be non-contentious business; that would not march with section 2 of the Act. Whatever difficulties there may be in interpreting the Order, it cannot alter my obligation to ask of the work done by the first solicitors: was it contentious business within the meaning of those words in the Act? If it was, then the Order cannot be applicable.

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[2] (1885) 30 Ch.D. 28.

[3] Ibid. 36.

So far I have been concerned with the Order of 1882 and considered matters as I think they stood under the Act of 1881. But the Solicitors' Remuneration Act, 1932, a consolidating Act, has to be considered. By section 56 of that Act, there is substituted for the power to make Orders given by section 2 of the Act of 1881 a new power to make Orders regulating the remuneration of solicitors in respect of non-contentious business. Section 82 (2) of the Act of 1932 provides that the Order of 1882 is to be treated as an Order under and for the purposes of the corresponding provisions, for this purpose section 56, of the Act of 1932. So the Order of 1882 was given a new lease of life, and indeed the Order of 1953 is merely an amendment of it made pursuant to section 56 of the Act of 1932.

A definition of non-contentious business appears in section 81 of the Act of 1932. It is of what I may call "the including" sort; it merely names some of the more obvious forms of non-contentious business as being included within that term. There is also a definition of contentious business of the same sort, naming obvious forms of contentious business. It does not seem to me that these forms of definition, or the fact that the Order of 1953 was made pursuant to section 56 of the Act of 1932, should cause me to change the conclusion I have previously expressed that there may be contentious business which is not business in any action or transacted in any court or in the chambers of any judge or master. Indeed, that distinction is still recognized in paragraph 4 of the Order of 1883 as it stands amended today.

The first solicitors, as I have said, did their work relating to this matter before the filing of the petition. The matter had passed out of their hands for some months by the time the petition was filed. Were they engaged in contentious or non-contentious business? I have reached a conclusion after considerable hesitation. I was referred to certain authorities, but I agree with counsels' view that they do not greatly assist me in this matter; I shall have to refer to some authorities, but they will appear in their proper context at a later stage. I think it of assistance to consider the position which would have arisen if there had been one firm of solicitors acting throughout. As the petition has now been filed, it appears to me that in the event of an order being made in the pending proceedings, either by agreement or after the hearing of the petition, that the husband should pay the wife's taxed party and party, or solicitor and client costs, the costs to which the client will be entitled will have to be ascertained by reference to R.S.C., Ord. 65, Appendix N. Rule 66 (3) of the Matrimonial Causes Rules, 1950, provides that in any cause or matter to which those rules apply, and they will apply in the pending proceedings, the costs allowed to the solicitors and the taxation of such costs shall, except where the Matrimonial Causes Rules, 1950, otherwise provide, and that does not arise here, be in accordance with the provisions of R.S.C., Ord. 65, so far as the same are applicable. Order 65, r. 8, provides that in causes or matters commenced after the rules came into force, solicitors shall be entitled to charge and be allowed fees set forth in the column headed "lower scale" in Appendix N in all causes or matters, and "no higher fees "shall be allowed in any case, except such as are by this Order "otherwise provided for; and in causes and matters pending at "the time when these Rules came into operation, to which the "higher scale of costs previously in force was applicable, the "same scale shall continue to be applied." Rule 9 provides for costs being allowed on the higher scale on special grounds, and there are other rules governing the amounts which may be allowed on taxation.

On any taxation on such an order as I have visualized, I think it is clear that some of the work done by the first solicitors, and to which the document of September 3, 1953, relates, would have to be dealt with under items 72 and 82 in Appendix N, subject to the discretionary powers of a taxing master under Order 85 to increase the items.

In the petition, allegations are relied upon which have their origin in work done by the first solicitors. Had there been one firm of solicitors acting throughout, that work would have had to be itemized in their bill of costs for the purpose of ascertaining the amount of costs payable by the husband under the order. A taxing master may, under Order 65, allow costs in respect of work done before the filing of a petition if, in his opinion, they have been properly incurred in obtaining materials proving of use and service in the proceedings. The authority for that is *Pêcheries Ostendaises (Soc. Anon.)* v. *Merchants Marine Insurance Co.*[4] and *Frankenburg* v. *Famous Lasky Film Service Ld.*[5]

[4] [1928] 1 K.B. 750; 44 T.L.R. 270.

[5] [1931] 1 Ch. 428.

Although there has been a change of solicitors, in my judgment if an order for the payment by the husband of the client's taxed costs is made, the second solicitors will have to include in their bill for taxation appropriate items in respect of the work done by the first solicitors upon the basis of which a substantial portion of the petition is founded. For, if such an order is made, the client has a right to recover from the husband all her proper costs of the proceedings, including those relating to work done on her behalf by the first solicitors. As there is a cause or matter, that is a basis upon which a taxation must proceed. Then by the rules the costs may relate back to work done when there was no cause or matter.

The difficulty in the dispute arises from the fact that at the date of the termination of the first solicitors' retainer, and indeed at the date at which this matter came before the master, the petition had not been filed, and there was then no cause or matter. I understand Mr. Lyell to contend on behalf of the client that these circumstances are immaterial, and that as upon any taxation in the pending proceedings items in respect of the work done by the first solicitors will fall to be considered under Order 65, Appendix N, those items can never have had the quality of non-contentious business. He also contended that because items are to be found in Appendix N, which would cover work done by the first solicitors, that work cannot be non-contentious business.

Sir Hartley Shawcross, for the first solicitors, submitted that when they were acting there was no contention, and that there must be at least two parties contending before there can be a contention, and therefore before there can be contentious business. He pointed out that there is no evidence that the husband or his advisers had knowledge of the fact that inquiries and preparations were being made by the first solicitors with the object of launching the petition if it were thought expedient. Sir Hartley further argued that the business in which the first solicitors were engaged could not be contentious business because there was then no filed petition, and that Order 65 could have no relevance to the first solicitors' costs, because it solely concerns the costs when there is a cause or matter, and there was none at the date when the retainer ended and they became entitled to demand their costs.

It seems to me that the test of whether business is contentious or not must be capable of being applied at the date when the solicitors were entitled to present their bill. The client might in

July, 1953, have decided, after the first solicitors had done all their work, to drop the idea of taking proceedings, or she might have decided to return to South Africa and see what the law of South Africa could secure for her. In either of these events, the first solicitors would have been entitled to ask for their costs, and to proceed to recover them. Clearly the test of whether they would then have been entitled to remuneration on a contentious or non-contentious basis should not be a guess as to whether the client would take proceedings at some date in the future. Further, it does not seem to me possible to say, merely because she might at some date file a petition and thereafter obtain an order for costs, which then must be taxed under Order 65, or merely because appropriate items appear in Appendix N, that solicitors seeking remuneration at a period when it was quite unknown whether a petition would ever be filed must demand their costs on the basis of Order 65, which only applies, even by relation back, when there is a cause or matter. So I am unable to accept Mr. Lyell's contention; but as I have said earlier, I am also unable to take the view that there cannot be contentious business outside the business in actual proceedings.

It is no doubt right that when the first solicitors were acting, the charges the client was minded to make against the husband had not been communicated to him or his advisers, nor, so far as I am aware, had any intention to make the charges been communicated to him or them, and there was then no contention between the parties in the sense in which Sir Hartley Shawcross used that word. But I do not think that I have to ask myself if there was then a contention in that sense. I think I have to ask myself what was the nature of the business upon which the first solicitors were then engaged, and to decide upon its proper description. It was the collection of information and the taking of all steps, even to the engrossment of a petition, necessary to launch proceedings hostile to the husband at the moment the client gave the word, the background to this work being that differences had arisen between the client and her husband which had resulted in her leaving the matrimonial home and South Africa at his suggestion. It seems to me that it is impossible without doing violence to language to describe that business as non-contentious. I hold that the document of September 3, 1953, related in part to contentious business, and the appeal therefore fails.

I ought to add this, that it would appear that the conclusion I have arrived at is not consistent with the decision of Neville J.

in *In re R. P. Morgan & Co.*,[6] but having carefully considered the argument addressed to me, and paid all due attention to that decision, I have felt bound to come to the conclusion which I have already expressed.

Appeal dismissed.

The solicitors appealed.

April 4. *Sir Hartley Shawcross Q.C.* and *Colin Duncan* for the solicitors. This appeal raises important questions in relation to solicitors' costs and, in particular, to the costs to which they are entitled in contentious and non-contentious business respectively. The question is one of the greatest general importance in connexion with the everyday work in a solicitor's office and it is very desirable, if possible, that the court should indicate for the guidance of the profession where the line is to be drawn between the two classes of business. It would be better to have a hard-and-fast line even though it created some anomalies, because there are a number of taxing masters and they may take different views on the question. On first principles it is submitted that contentious business is that which involves only a litigious contention. It is a misuse of language to describe as contentious in the present context anything which does not involve contention between two or more parties. Any legal work may become contentious in futuro, e.g., the drafting of a conveyance or a will, or even the giving of an opinion, since they may later be the subject of, or lead to, litigation. But that does not make the business contentious at the time when it was done. The definitions given in section 81 of the Solicitors Act, 1932, on the distinction between contentious and non-contentious business confuse the issue. The section says that contentious business includes any business done by a solicitor in any court, and describes non-contentious as including "any business connected with sales . . . "settlements and other matters of conveyancing." The section does not define the meaning to be attached to the words contentious or non-contentious and leaves uncovered an undefined intermediate area, namely, business not in court and not connected with conveyancing.

Where, then, is the line to be drawn between the two classes of business? It would appear from *In re R. P. Morgan & Co.*[1] that the courts have apparently drawn the line at the date of the issue of the writ or other process and held that anything done outside court before the commencement of proceedings, although directly related to contemplated or even inevitable proceedings, is non-contentious, while anything done in relation to court proceedings already commenced, whether done in or out of court, is contentious. Against that view it might be argued that some costs incurred before writ issued, e.g., advice, settling writ and the like, are allowed on a party and party taxation between litigants, but the flaw in that argument is that such items only become contentious ex post facto and if the writ had not been issued they would, on the theory suggested, have remained non-contentious. If the first paragraph of the headnote in *In re R. P. Morgan & Co.*[1] is accurate, namely, that the drawing of a case for counsel to advise in contemplation of litigation is non-contentious business, the contention for the appellants on this point must be right. Neville J.'s decision in *In re R. P. Morgan & Co.*[1] was followed in the Irish case of *In re The Rathmines and Rathgar Improvement Commissioners and Field*[2] and was also supported by an opinion given by Mr. R. S. Wright (afterwards Wright J.) in 1888 and published in the Law Society's Digest for 1923. It is very much in point that the Judicature Act, 1925, authorizes the making of rules of court in regard to costs only in the case of proceedings in court. The Schedules laid down by the rules cannot, in law, have any application to business before the commencement of proceedings.

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[6] [1915] 1 Ch. 182.

[1] [1915] 1 Ch. 182.

The view taken by Neville J. in *In re R. P. Morgan & Co.*[3] has been followed ever since until recently, when different views have been taken in the taxing office. It is submitted that Gerrard J. had no material or authority before him which entitled him to dissent from or disregard a practice which had been in force for nearly 70 years. To sum up the appellants' contention on the first point raised: to constitute contentious business, the business must involve the existence of two parties between whom a lis exists, and, if that is so, until proceedings have been started by the issue of a writ or other legal process, the business is still non-contentious. The issue of the writ is the only point at which a definite line can be drawn dividing the two classes of business and that view is supported by authority and long continued practice.

The second question is whether the bill delivered by the solicitors in the present case was a proper one at the date when it was delivered having regard to the fact that it was a lump sum and not an itemized bill. If, as is contended, the bill was in relation to non-contentious work, it is submitted that the bill delivered was in order. The Solicitors Remuneration Act, General Order, 1920, made under section 2 of the Act of 1881, allowed for the delivery of a gross sum bill in the case of non-contentious work, subject to the right of the client to demand an itemized bill within 12 months. That was revoked by the Solicitors Remuneration (Gross Sum) Order, 1934, which was to the same effect but substituted for 12 months a period of six months within which an itemized bill could be demanded. The Solicitors' Remuneration Order, 1953, preserved the solicitor's right to deliver a lump sum bill in relation to non-contentious matters. It did not renew the client's right to demand an itemized bill, but substituted a safeguard for the client by permitting a reference of the bill to the Law Society for a certificate of reasonableness, and preserved, subject to the discretion of the court, the client's right to taxation. What is required now in the case of a bill for non-contentious work is that it should contain a summarized statement of the work carried out which is sufficient to tell the client what he is paying for, and the bill delivered in the present case satisfied that requirement. [*Société Anonyme Pêcheries Ostendaises* v. *Merchants Marine Insurance Co. Ld.*[4] was also referred to.]

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[1] [1915] 1 Ch. 182.

[2] [1922] 1 I.R. 13.

[3] [1915] 1 Ch. 182.

Maurice Lyell Q.C. and *John Shaw* for the client. Gerrard J. was right in ordering the solicitors to deliver two bills of costs, an itemized bill in relation to the contentious business and a second bill, which might be a lump sum, in respect of non-contentious business done for the client. The important question in the present case is the distinction to be drawn between contentious and non-contentious business, and it is submitted that the difference is to be ascertained by considering the nature of the business in question and that it cannot be determined by drawing a hard and fast line at the date of the writ. The decision in *In re R. P. Morgan & Co. Ld.*[5] that the obtaining of counsel's opinion in contemplation of litigation is not contentious is accepted, but it is submitted that there are cases in which a case to advise may be a contentious matter for which the costs would be allowed on a party and party taxation. In the Taxing Masters Notes, compiled in 1902 (see the Annual Practice, 1954, p. 2834), the opinion is expressed that "a case to advise before "action may be allowed as between party and party, if really

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[4] [1928] 1 K.B. 750; 44 T.L.R. 270.

[5] [1915] 1 Ch. 182.

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"useful and necessary, but sparingly." It would, therefore, appear that when the costs of an opinion or other business done before action could be recovered against the other side on a party and party taxation, the business in question should be regarded as contentious, and it is submitted that the drafting of a petition for judicial separation, in any event, could have no other purpose than a contention. In respect of that item and others considered to be contentious business by Gerrard J., he rightly decided that the solicitors must deliver an itemized account.

With regard to the question of what particulars must be given in the case of a bill for non-contentious business, the position is that since the Solicitors' Remuneration Order, 1953, a lump sum bill may still be delivered without detailed charges, as permitted by the Solicitors' Remuneration Order, 1920, but it must contain summarized charges which will indicate to the client the nature of the work for which he is being called on to pay, including particulars of the time expended and the numbers of the documents prepared. That information was not provided in the present bill, and in its absence there might be a question whether the bill would have been a good one so far as non-contentious business was concerned.

Gerrard J. held that the bill would have been good if it had related entirely to non-contentious business but that the inclusion in it of items in relation to contentious business rendered the delivery of an itemized bill in respect of such items necessary. He came to a correct decision and the appeal should be dismissed. [Reference was also made to *Lumsden* v. *The Shipcote Land Co.*[6]]

Sir Hartley Shawcross Q.C. replied.

Cur. adv. vult.

April 22. The following judgments were read.

DENNING L.J. The facts of this case are fully set out in the judgment of Gerrard J.,[1] and I need not repeat them again. They raise important questions about solicitors' costs.

There is a great difference for solicitors between "contentious "business" and "non-contentious business." A bill for contentious business must be made out item by item, with a separate charge against each item; but a bill for non-contentious business can be charged by a lump sum. The difference in the method of charging leads to a difference in the amount which the solicitor receives. Non-contentious business is, I believe, more remunerative than contentious business.

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[6] [1906] 2 K.B. 433; 22 T.L.R. 559.

[1] Ante, p. 253.

Although the difference is so important to solicitors, there is no clear guidance to be found anywhere to enable the profession to distinguish between contentious business and non-contentious business. The Solicitors Act, 1932, evades the issue. In section 81 it says, what is obvious, that "contentious business" includes business in court, and that "non-contentious business" includes conveyancing business; but this does not help to decide difficult cases. The section does not say what "contentious "business" means or what "non-contentious business" means.

We are thus left to find out for ourselves. Sir Hartley Shawcross asked us to draw a clear line for the guidance of the profession. We should have liked to accede to his request if we could. It seems to me that if a clear line is to be drawn there is only one possible place for it, namely, the issue of the writ or other originating process in the courts of law. All business before that date could be said to be non-contentious, and all business afterwards to be contentious. It would be very convenient if we could draw that line, but I do not think that we are at liberty to do so, for the simple reason that it is not the line drawn by Parliament. The statutory distinction depends on the nature of the business—contentious or non-contentious—not on the time at which it is done.

Let me test the position by taking a case where a client asks his solicitor to bring an action. The solicitor thereupon instructs counsel to draft the writ and the statement of claim to be served with it. If the action goes for trial, the costs of that work are recoverable as costs in the action. They are not disallowed simply because the work was done before the writ was issued. It is clearly contentious business. Now suppose that in that very case the solicitor had to take statements from witnesses so as to enable counsel to settle the statement of claim. If the action goes for trial, the cost of that work would also be recoverable as costs in the action: see *Société Anonyme Pêcheries Ostendaises* v. *Merchants Marine Insurance Co. Ld.*[2] and *Frankenberg* v. *Famous Lasky Film Service Ld.*[3] It would also be contentious business.

Now suppose that after the solicitor had done all that work, but before the writ was actually issued, the case was settled by the defendant paying the claim. Does the work take on a different character simply because the case was settled? Surely not. If it is contentious business when the case goes for trial, it is also contentious business when the case is settled before the writ is issued. The issue of the writ does not alter the nature of the business; nor should it alter the method or amount of the solicitor's charges. He should get the same reward for the same work, no matter whether the case goes for trial or is settled the moment before writ issued or the moment after it.

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[2] [1928] 1 K.B. 750; 44 T.L.R. 270.

[3] [1931] 1 Ch. 428.

So far there is no difficulty; but suppose that a solicitor asks counsel to advise on the prospects of success before he instructs him to settle the writ. Would the case to advise be contentious business or not? I can well see that in many cases a case to advise on the client's rights would be non-contentious business: see the opinion of Mr. R. S. Wright (afterwards Wright J.), dated January 13, 1888, published in the Law Society's Digest (1923 ed.), and also *In re R. P. Morgan & Co.*[4] But there are some cases where a case to advise may be contentious business. The taxing masters in their practice notes say that "a case to "advise before action may be allowed as between party and "party, if really useful and necessary, but sparingly" (see the Annual Practice, 1954, p. 2834). It seems to me that in those cases where the costs of an opinion can be recovered against the other side, it must be contentious business.

These illustrations persuade me that where the work done before writ is such that, if the case went to trial, it would properly be allowed as against the other party on a party and party taxation, then it is contentious business, even though a writ is not in fact issued; but if the work would not be allowed on a party and party taxation, it is not contentious business. I am aware that this test sounds vague and indefinite, but the managing clerks in solicitors' offices have a very good idea of what business will or will not be allowed on taxation, and I feel sure that they will be able to apply this test and say without difficulty what is contentious business or not. All work done in the cause itself after writ is, of course, contentious.

Sir Hartley Shawcross said that, when no writ or other process was issued, there was no scale by which to charge for contentious business, and he pointed out that it might happen that a case was settled before it was decided whether it should be taken in the High Court or the county court. This is, no doubt, true, but I do not think it should give rise to any difficulty in practice. The taxing masters will act on analogy to R.S.C., Appendix N. They will tax the bill on the same footing as if a writ had been issued. In case of doubt whether it would have been a High Court or county court action, they will, I expect, give the solicitor the benefit of the doubt and allow him to charge on a High Court scale.

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[4] [1915] 1 Ch. 182.

Applying the principles which I have stated, I have no doubt that a good deal of the business contained in this bill was contentious business. The drafting of the petition for judicial separation and all the work connected with it was clearly work which would have been allowed on a party and party taxation. The solicitors should have delivered a separate bill of costs for all this contentious business, with detailed items and charges. Another bill should have been delivered for the non-contentious business, and that could have been for a lump sum. The bill which was in fact delivered was a bad bill, because it did not distinguish between the two and treated it all as non-contentious business, which was wrong.

I now proceed to consider the second point, which is this: assuming that the work was all non-contentious, was the bill a good bill?

Until the year 1920 a solicitor's bill, even for non-contentious work, had to be drawn in the traditional way, item by item, with a separate charge against each item. By the Solicitors' Remuneration Act General Order, 1920, as re-enacted by the Solicitors' Remuneration (Gross Sum) Order, 1934, a solicitor was authorized to charge a gross sum for non-contentious business, in lieu of detailed charges, but it was provided that the client could within six months insist on a detailed bill of charges, just as if no gross sum were permissible. In 1953 the Solicitors' Remuneration Order, 1953, was made, which made great alterations in the method of charging for non-contentious business. The solicitor is now entitled to " such sum as may " be fair and reasonable having regard to all the circumstances " of the case." This, I think, means a lump sum as before, but whereas previously the client could afterwards insist on a detailed bill of charges, he now has no right to have the lump sum split up into items. He is, however, given a valuable new right. He can require the solicitor to put the bill before the Law Society, so that the Law Society can see whether the sum charged is fair and reasonable. If it is fair and reasonable, they will certify accordingly; or if not, they will say what the proper sum should be.

We were shown the form of application used by the Law Society when this procedure is invoked. It seems to be well designed to enable the matter to be properly investigated. The solicitor has to give to the Law Society full details of all the work he has done, the time spent by himself, his assistants and his clerks respectively, and all the material circumstances. The form contains a questionnaire in which the solicitor has to set out all the particular circumstances specified in the Order of 1953. The investigation is held without any expense to the client, and it is a great protection for him. The only drawback about it is that the client has no right to see the details which the solicitor gives to the Law Society, and we were told that the client was not allowed to see them. He is not, therefore, in a position to challenge their accuracy. But this drawback is not so serious as it might at first sight appear, because the client still has the right to have the bill taxed by the taxing master, and the new Order expressly says that "it shall be the duty of "the solicitor to satisfy the taxing master as to the fairness and "reasonableness of his charge." The taxing master can, therefore, call for all the details just as the Law Society can, and he will no doubt see that the client and his new advisers have full opportunity of considering these details, so that the client can challenge them, if he so desires.

Such being the effect of the new Order, the question is: what must a solicitor's bill for non-contentious business now contain? It need not contain detailed charges as it used to do before 1920. Nor need it contain all the details which the solicitor will have to give, if required, to the Law Society or the taxing master. But I think that it must contain a summarized statement of the work done, sufficient to tell the client what it is for which he is asked to pay. A bare account for "professional services" between certain dates, or for "work "done in connexion with your matrimonial affairs" would not do. The nature of the work must be stated, such as, advising on such and such a matter, instructing counsel to do so and so, drafting such and such a document, and so forth. Tried by this test, I am of opinion that the bill delivered by the solicitors in this case would have been a good bill if it had been all non-contentious business. But I think it fails because it was not all non-contentious. Part of it was contentious business. Two separate bills should have been delivered to cover the two kinds of business. I find myself in agreement with Gerrard J. The appeal must be dismissed.

PARKER L.J. The first question is whether any part of the work covered by the bill of September 3, 1953, relates to contentious business. If it does, then it is conceded that it is not a good bill. The expressions "contentious business" and "non-"contentious business" first appear in relation to solicitor's remuneration generally in the Solicitors' Remuneration Act, 1881. That Act provides for the making of general orders for remuneration in relation to non-contentious business. Everything, by section 2 of that Act, is treated as non-contentious business except "business in any action, or transacted in any court, or in the "chambers of any judge or master, and not being otherwise "contentious business." Thus, while not defining contentious business, it recognizes that there is contentious business which is not business in any action or transacted in any court or in the chambers of any judge or master.

Pursuant to that Act, the Solicitors' Remuneration Order, 1883, was made. Oddly enough, the wording of the order did not follow the wording of the Act by excluding from its ambit all contentious business, but only business in any action or transacted in any court or in the chambers of any judge or master. Accordingly, read alone, the order purported to cover business coming within the words "being otherwise contentious business." I say "read alone," because the order could not cover a wider field than that allowed by the Act, and could not, therefore, cover business within that expression.

In 1932 the Solicitors Acts, 1839 to 1928, were consolidated by the Solicitors Act, 1932. Far from taking the opportunity to define "contentious business," Parliament merely provided by section 81 that " 'contentious business' includes any business "done by a solicitor in any court." As I have mentioned, that Act was a consolidating Act, and I am quite satisfied that by that inclusive definition the Act did not purport to convert whatever was already covered by the expression "being otherwise conten-"tious business" into non-contentious business. Section 56 provided power to make general orders for non-contentious business, and by section 82 (2) the order of 1883 was to be treated as an order under and for the purposes of the Act. The position was thereby preserved under which the order on its face, though not in truth, covered business which comes within the expression "being otherwise contentious business." What then is covered by that expression?

It is urged on behalf of the appellants that contentious business means business in which there is a litigious contest. There must, it is said, be two parties between whom there is a lis, and accordingly, unless and until a writ or other process has been issued, the business remains non-contentious, even though the solicitor has the client's instructions to launch proceedings. Only thus, it is said, can a hard-and-fast line be drawn which will enable the solicitor to determine on what basis to prepare his bill. It is further pointed out that if business prior to the proposed action were classed as contentious business and proceedings were not in fact instituted, there is no measure laid down for determining the remuneration. The order covering non-contentious business would not apply, and since no proceedings were instituted, R.S.C., Ord. 65, and Appendix N would be inapplicable. On the basis of this argument the only suggestion put forward is that the expression "being otherwise contentious business" might be a reference to arbitrations or other proceedings in which there is some form of lis.

For the respondent it is contended that it is not the time when the work is performed, but the quality of the work, the kind of business performed, which is the determining factor. This was the view taken by Gerrard J., and I agree with him. It seems to me that the expressions "non-contentious business" and "contentious business," when used in the Acts and the orders, are referring to the nature of the work. If the commencement of proceedings had been intended to be the determining factor, how easy it would have been to say so in the definition section in the Act of 1932. Moreover, it is to be observed that conveyancing matters are classed as non-contentious business, even if the work is done during proceedings, cf. *Stanford* v. *Roberts*,[5] which again points to the nature of the work being the test. Further, any contrary view would lead to the absurd result that the solicitor would be entitled to different remuneration for identically the same work, depending on whether the claim was settled the day before or the day after proceedings were launched. Again, it is to be observed that in a taxation under Order 65 of admittedly contentious business the master has a discretion under rule 27 (29) of the order to allow costs incurred before the issue of the writ, cf. *Société Anonyme Pêcheries Ostendaises* v. *Merchants Marine*

[5] (1884) 26 Ch.D. 155.

Insurance Co. Ld.[6] As Atkin L.J. said[7]: "It is quite obvious "that those costs are not limited to costs incurred after the writ "has been issued. Costs incurred before action brought are "allowed every day to a limited extent, as appears by the Taxing "Master's Practice Notes, which, though not binding, govern the "practice. I am not at all sure that the conventions fixed by the "masters are not too narrow, but they may be very wise, because "they deal with the costs of this kind which are commonly "in dispute; but their discretion as to costs certainly extends "beyond that. The taxing master has discretion in every case "to decide whether the costs incurred before the action were "necessary or proper for the attainment of justice; and the "costs the taxing master has allowed in the present case may "very well be included in that expression. A very good example "of this was put in argument: it was a case of an accident "happening owing to a railway bridge breaking down, when the "railway bridge has to be replaced forthwith and the state of the "bridge is said to be the cause of the action. In such a case it is "essential that there should be an immediate inspection by "skilled witnesses of the state of that bridge. In those circum-"stances the taxing master might well hold that such costs "incurred before the issue of the writ were necessary for the "attainment of justice, because the actual facts to be ascertained "from such an inspection could not be ascertained at a later "date; and, of course, the taxing master in coming to a con-"clusion would have to consider the probability of the defendant "disputing liability."

This again points to the view that the date of the issue of the writ is not the determining factor. Nor do I think that the fact that no statutory measure exists for determining the remuneration leads to a different interpretation. If a claim is settled before the issue of the writ, the taxing master could, and no doubt would, tax the bill for the preliminary work according to the same measure as he would under the rules have had to employ if the proceedings had actually commenced.

No doubt this view is not so convenient to solicitors in that there is no hard-and-fast line for determining whether, when business is performed, it is non-contentious or contentious. Each case will depend on its own special facts, but I suggest that some guide can be found in the current Practice of Taxing Masters. If the business performed is such that, under that practice, masters would allow the cost under Ord. 65, r. 27 (29), should proceedings ensue, then I think that it would be proper to treat the business as contentious business. I see no reason why in practice this should not afford a sufficient guide.

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[6] [1928] 1 K.B. 750.

[7] Ibid. 762.

Finally, reference was made to *In re R. P. Morgan & Co.*[8] In that case Neville J. decided that the work of drawing a case for counsel to advise in contemplation of litigation was non-contentious business. I have no doubt that that case was rightly decided on its own facts and, indeed, applying the guide suggested above, the Masters' Practice Notes show that the cost of such work is only sparingly allowed. As I read his decision, he was not saying that in all cases the date of the commencement of proceedings is the determining factor.

Turning to the facts of the present case, I cannot do better than quote from the judgment of Gerrard J.[9]: "I think I have to "ask myself what was the nature of the business upon which the "first solicitors were then engaged, and to decide upon its proper "description. It was the collection of information and the taking "of all steps, even to the engrossment of a petition, necessary to "launch proceedings hostile to the husband at the moment the "client gave the word, the background to this work being that "differences had arisen between the client and her husband which "had resulted in her leaving the matrimonial home and South "Africa at his suggestion. It seems to me that it is impossible "without doing violence to language to describe that business as "non-contentious."

I agree with that passage. Accordingly if, as I think, the determining factor is the nature of the work, it is clear that some part of the work covered by the bill of September 3, 1953, is contentious business.

So far as the second question is concerned, I have nothing to add to what has been said by Denning L.J. I would dismiss the appeal.

DENNING L.J. Roxburgh J. authorizes me to say that he has read the two judgments which we have delivered, and agrees with them.

Appeal dismissed.

Solicitors: *Bull & Bull; Forsyte, Kerman & Phillips.*

P. B. D.

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[8] [1915] 1 Ch. 182.

[9] Ante, p. 264.

SMITH *v.* VEEN.

1955
Apr. 28.

Lord Goddard C.J., Hilbery and Pearce JJ.

Shipping—Compulsory pilotage—Home trade—Pilotage authority by-law exempting "home trade ships"—Dutch ship regularly trading within home trade limits—Master's refusal to carry pilot on voyage to port beyond home trade limits—Whether exempted—"Home "trade ship"—Pilotage Act, 1913 (2 *&* 3 *Geo.* 5, *c.* 31), *s.* 11 (1) (2) (4)—*Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 742.

Statute—Construction—Argument ab inconveniente—Clear line for justices.

By section 11 (4) of the Pilotage Act, 1913, a pilotage authority may by by-law exempt from compulsory pilotage in their district ". . . (ii) Home trade ships trading otherwise than coastwise" if not carrying passengers, such ships being "excepted ships." By section 742 of the Merchant Shipping Act, 1894: "'Home trade "'ship' includes every ship employed in trading or going within "the following limits; that is to say, the United Kingdom, the "Channel Islands, the Isle of Man, and the continent of Europe "between the river Elbe and Brest inclusive." By-laws were made accordingly by the London Pilotage Authority.

A Dutch ship, trading regularly within the home trade limits, set out on a voyage to Oslo, calling on the way at a Dutch home trade port. The master refused to carry a pilot from Sheerness through the London pilotage district or to show a pilot flag:—

Held, that a ship generally trading between ports in the United Kingdom and ports in Northern Europe within the home trade limits set out in section 742 of the Merchant Shipping Act, 1894, was no longer engaged in the home trade if she set out on a voyage from a port in the United Kingdom to a port beyond the home trade limits, and therefore, as the ship, on the particular voyage on which she was engaged, was bound for Oslo, she was not going within the home trade limits and was required to carry a pilot.

CASE STATED by Gravesend justices.

On October 22, 1954, informations were preferred by Mr. Sydney Rawlings Smith, Principal of the Pilotage Department of Trinity House, against the defendant, Mr. Van der Veen, alleging that he, on August 27, 1954, in the estuary of the River Thames and within the London Pilotage District, being the master of the *M.V. Adara*, navigated the ship, which was not an excepted ship, between Sheerness and the limit of the London Pilotage District in circumstances in which pilotage was compulsory, but without being under the pilotage of a licensed pilot of the district after such a pilot had offered to take charge of the ship, contrary to section 11 (1) and (2) of the Pilotage Act, 1913 [1]; that he failed to display a pilot signal contrary to section 43 (1) and (3) of the Act; and that he failed to give the charge of piloting the ship to a licensed pilot of the district after the pilot had offered his services as pilot, contrary to section 44 (1) and (3) of the Act.

The justices heard the informations on December 22, 1954, and found the following facts: By clause 1 (2) of Part IX of By-laws, Rules and Regulations made pursuant to section 11 (4) of the Pilotage Act, 1913, by the pilotage authority of the London Pilotage District, which came into force on August 1, 1914, "home "trade ships" of less than 3,500 tons gross tonnage trading otherwise than coastwise were, when not carrying passengers, exempted from compulsory pilotage in the London Pilotage District extending from Sheerness as far as the Sunk. The *Adara*, a motor vessel of 278 gross tons and registered in Groningen, Holland, of which vessel the defendant was the master, sailed from Strood, Kent, on August 27, 1954. The ship was not carrying passengers and was bound for Oslo, but was going first to Ymuiden in Holland to take on stores. Oslo was a port beyond, but Ymuiden was a port within, the limits set out in section 742 of the Merchant Shipping Act, 1894,[2] with reference to the definition of a "home

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[1] Pilotage Act, 1913, s. 11: "(1) "Every ship (other than an excepted "ship) while navigating in a pilotage "district in which pilotage is compul"sory for the purpose of entering, "leaving, or making use of any port "in the district . . . shall be either— "(*a*) under the pilotage of a licensed "pilot of the district; or (*b*) under "the pilotage of a master or mate "possessing a pilotage certificate for "the district . . .

"(2) If any ship (other than an "excepted ship) in circumstances in "which pilotage is compulsory under "this section, is not under pilotage "as required by this section, after "a licensed pilot of the district has "offered to take charge of the ship, "the master of that ship shall be "liable in respect of each offence to "a fine . . .

"(3) For the purposes of this Act "the following ships are excepted "ships:— . . . (*f*) Ships exempted "from compulsory pilotage by by"law as hereinafter provided in this "section.

"(4) A pilotage authority may by "by-law made under this Act exempt "from compulsory pilotage in their "district any of the following classes "of ships, if not carrying passengers, "up to such limit of gross tonnage "in each case as may be fixed by "the by-law, that is to say:— . . . "(ii) Home trade ships trading other"wise than coastwise; . . .

"(5) For the purposes of this sec"tion, a ship which habitually trades "to or from any port or ports outside "the British Islands shall not be "deemed to be trading coastwise, and "a ship which habitually trades to "or from any port outside the home "trade limits shall not be deemed to "be a home trade ship, by reason "only that she is for the time being "engaged on a voyage between ports "in the British Islands, or within "the home trade limits, as the case "may be."

[2] Merchant Shipping Act, 1894, s. 742: "'Home trade ship' includes "every ship employed in trading or "going within the following limits;

"trade ship." The defendant employed the services of a licensed pilot of the London Pilotage District from Strood because he was not familiar with the passage from Strood to Sheerness, but caused the pilot to disembark at Sheerness after the pilot had offered his services as pilot up to the Sunk. The *Adara* proceeded from Sheerness without a licensed pilot on board and without displaying a pilot signal. Before August 27, 1954, the *Adara* had been regularly engaged in trading within the home trade limits, and on July 1, 1954, the Pilotage Department of Trinity House granted in respect of the ship a certificate of exemption from compulsory pilotage, which was stated to remain in force for 60 days provided that the vessel neither carried passengers nor traded outside the "home trade" limits during that period. It was admitted by the prosecutor that there was no statutory authority for the issue of such certificates.

It was contended by the prosecutor that as the *Adara* was bound for a port outside the limits defined in section 742 of the Merchant Shipping Act, 1894, for a "home trade ship" she was not an "excepted ship" as provided by Part IX of the By-laws, Rules and Regulations made by Trinity House on August 1, 1914, under section 11 (4) of the Pilotage Act; that a vessel on a "foreign" voyage carrying goods to a non-home trade port could not be classed as a "home trade" vessel; and that once a foreign trade element appeared the ship lost any previous exemption it might have had.

It was contended by the defendant, inter alia, that (a) the *Adara* was regularly engaged in the "home trade" and was therefore an "excepted ship," and the exception was not forfeited on an occasional outward journey to a non-home trade port; (b) that the definition of a "home trade ship" in section 742 of the Merchant Shipping Act, 1894, was not exhaustive but merely inclusive of the type of trade defined in the section; and (c) that the object of pilotage was to provide for safe navigation and that it would be oppressive and unreasonable to require a vessel regularly engaged in the home trade to carry a pilot on an outward voyage to a port outside the home trade limits.

The justices were of opinion that the *Adara* was habitually engaged in the home trade; that she was still an excepted ship on her outward voyage to a non-home trade port and therefore did not require a pilot; that the definition of a "home trade

"that is to say, the United Kingdom, "the Channel Islands, the Isle of "Man, and the continent of Europe "between the river Elbe and Brest "inclusive."

"ship" in section 742 of the Merchant Shipping Act was not confined to ships trading within the limits therein set out but was inclusive of such ships; and that it would be unreasonable to hold that the *Adara* was not an "excepted ship" on this voyage. Accordingly, they dismissed the informations. The prosecutor appealed.

J. V. Naisby Q.C. and *H. E. G. Browning* for the prosecutor. The short point in this appeal is whether a ship normally engaged in home trade which sails to a foreign port outside the home trade limits ceases for the purpose of that voyage to be a home trade ship. There is no authority on the point although there are decisions on whether a foreign-going ship remains a foreign-going ship when going on home trade.

By section 62 of the Pilotage Act, 1913, that Act is to be construed together with the Merchant Shipping Act, 1894, which, by section 742, defines a "foreign-going ship" and a "home "trade ship." Those definitions are mutually exclusive. The word "includes" in the definition of a "home trade ship" cannot be extended to cover a vessel going to a port outside the home trade limits defined by the section, because once she goes outside those limits she is caught by the definition of a foreign-going ship. It is suggested that the purpose of section 11 (5) of the Pilotage Act is to afford some explanation of those definitions. Moreover, before the passing of the Pilotage Act in 1913 there were a number of cases where ships normally engaged in foreign trade, generally ships trading between home ports and the Far East, attempted to say that pilotage was not compulsory when they were voyaging between British ports, e.g., London and Liverpool, for the purpose of discharging their cargo partly at one port and partly at the other. In many of those cases pilotage was held to be compulsory: see, for example, *The Glanystwyth.*[3] On the other hand, there were cases where it was held that pilotage was not compulsory when such vessels were trading between home ports: *The Rutland.*[4] Section 11 (5) might have been intended to cover that point.

It is conceded that in the case of a foreign-going ship regard must be had to the general character of the vessel. In *The Sutherland*,[5] where a ship, on a voyage from Liverpool to Hamburg, after a collision put into the Thames for repairs, and while under a pilot's charge collided with another vessel in the Thames, the question arose whether the employment of a pilot was compulsory. That turned on the construction of section 379 (3) of the Merchant Shipping Act, 1854, which exempted from compulsory pilotage in the London area non-passenger carrying ships trading coastwise and, inter alia, ships going to Boulogne or to any place in Europe north of Boulogne. The court held that the exemption applied, Sir James Hannen P. saying[6] that no accident could cause a ship to lose her particular trading character, but the President's observations, made later in his judgment,[7] to the effect that a ship generally trading to a port north of Boulogne would not be exempt if she were not at the time on a voyage of that character, are important for the purposes of the present case. It is admitted that those remarks were obiter.

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[3] [1899] P. 118; 15 T.L.R. 224.

[4] [1897] A.C. 333.

[5] (1887) 12 P.D. 154.

[LORD GODDARD C.J. Those observations seem to be directly in point. If a ship is a home trade ship how many voyages beyond the home trade limits must she go before she ceases to be a home trade ship?]

It is submitted that she ceases to be a home trade ship the first time she deliberately sets out on a voyage beyond the home trade limits.

Ashton Roskill Q.C. and *B. S. Eckersley* for the defendant. This is a matter of considerable concern to the shipping industry in general and in particular to masters of foreign-owned ships who come to this country and find themselves prosecuted in courts of summary jurisdiction when they believe that they have committed no criminal offence at all.

The expression " home trade ship " in section 11 (4) (ii) of the Pilotage Act and the by-laws made pursuant thereto refers to the ship's normal commercial user and involves an inquiry in any particular case into the ship's trading habits in order to decide whether or not she has lost her home trade character. Section 742 of the Merchant Shipping Act, 1894, sets out the geographical limits of the home trade. The definition of " home " trade ship " in that section similarly looks primarily to the character of the ship in the light of her habitual user. The contrary view involves omitting the words " employed in " from the section or, alternatively, inserting the words " for the time being " trading. This is a penal statute and the words must be strictly construed: *The Sutherland*, *per* Butt J.[8] For the same reason if there is any ambiguity the section should be construed in favour of the defendant.

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[6] 12 P.D. 154, 155.

[7] Ibid. 156.

[8] 12 P.D. 154.

If the court is satisfied as a matter of construction that a vessel is one which is generally employed in trading as a home trade ship, then the fact that she may on a particular voyage go outside the limits ceases to be material.

[LORD GODDARD C.J. referred to the observations of Sir James Hannen P. in *The Sutherland*.[8]]

It is submitted that those words ought to be read in the light of Sir Francis Jeune P.'s observations in *The Glanystwyth*.[9] In any event, that case does not cover the present case as it was decided under an earlier Act where the exemption provisions applied to ships employed in coastwise trade. In considering whether or not a vessel was employed in trading coastwise the courts have had regard to the character of the vessel and not to the particular voyage on which she was engaged, and have held that a vessel employed in coastwise trade is a ship habitually trading in that trade. In the Merchant Shipping Act, 1894, the legislature adopted a definition of "home trade ship" using virtually the same language as that used in the Act of 1854 in respect of a coastwise trade ship. By analogy the test in deciding what is a home trade ship ought to be the same as that employed for vessels trading coastwise. That affords a sensible commercial approach to the question and is one which would appeal to courts of summary jurisdiction, to traders and to Trinity House pilots.

[PEARCE J. If your contention is correct, then under section 742 of the Merchant Shipping Act a foreign-going ship means one habitually trading abroad. Why was section 11 (5) of the Pilotage Act necessary at all?]

That subsection was necessary in view of the line of authorities which decided that a ship which habitually traded to foreign ports could become a home trade ship by occasionally trading to a home port: *The Rutland*.[10] There has been no similar decision since the Pilotage Act was passed.

A ship with a home trade character retains that character until it is decided as a question of fact that she has lost it. Alternatively, it is submitted that this vessel was "going within "the following limits" laid down in section 742 of the Merchant Shipping Act because she was going first to Ymuiden, a port within the home trade limits, even though her ultimate destination was Oslo. There was material on which the magistrates could reach their decision; they were clearly influenced by the reasonableness of the case, and it is submitted that they were right in law.

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[8] 12 P.D. 154.

[9] [1899] P. 118, 124.

[10] [1897] A.C. 333.

Naisby Q.C. was not called upon to reply.

LORD GODDARD C.J. This is a case stated by the justices for the Borough of Gravesend which raises an interesting and important point under the Pilotage Act, 1913. I recognize the careful way in which the case has been drawn and the consideration which the justices have given to it, although we have to differ from them, and I regret that the point has to be tested by means of a prosecution before a court of summary jurisdiction from whose decision an appeal lies to this court, our decision being final. In a case of this great importance it would be more satisfactory if it could be appealed. However, I do not feel any doubt about the matter.

The three informations laid against the master of the ship charged him with offences against section 11 (1) and (2) of the Pilotage Act, 1913, and all three informations really raise the same point. The question is whether the ship was an "excepted "ship" exempting it from the requirements of the Act and by-laws made thereunder so that she need not carry a pilot on the particular voyage on which she was engaged.

Section 11 (4) of the Pilotage Act, 1913, an Act which repealed the old pilotage sections in the Merchant Shipping Act, 1894, and re-enacted the requirements with regard to pilotage, provides: "A pilotage authority may by by-law made under this Act "exempt from compulsory pilotage in their district any of the "following classes of ships, if not carrying passengers, up to "such limit of gross tonnage in each case as may be fixed by the "by-law, that is to say:—(i) ships trading coastwise; (ii) home "trade ships trading otherwise than coastwise; (iii) ships whose "ordinary course of navigation does not extend beyond the sea-"ward limits of a harbour authority, whilst navigating within "those limits or within such parts thereof as may be specified in "the by-law." If, therefore, a ship is a home trade ship, it is exempted. We have then to find out what a "home trade ship" is. Section 742 of the Merchant Shipping Act, 1894, which has to be read together with the Pilotage Act, 1913, does not exactly define a "home trade ship" but states that a "home trade ship" includes "Every ship employed in trading or going within the "following limits; that is to say, the United Kingdom, the "Channel Islands, the Isle of Man, and the continent of Europe "between the River Elbe and Brest inclusive."

In the present case the justices found that the ship had been regularly employed within the home trade limits. On the particular occasion on which the master is said to have been guilty of the offences the ship was on a voyage from London to Oslo, but was intending to call and did call to take in stores at a Dutch port within the home trade limits. Therefore it is said, first, that the ship was on a voyage within the home trade limits because she was going to call at a port within those limits, and secondly, that once she acquired the character of a home trade ship she could not lose it until she had ceased habitually or regularly to trade within the home trade limits. Whether she would then be an habitually foreign-going ship or one that sometimes went within the home trade limits and sometimes outside them I do not know. But it seems to me that if the court can find a construction which would enable justices to see at once whether a ship ought or ought not to be carrying a pilot, it would be far preferable to leaving them to consider at considerable length whether a ship had lost a character she had once acquired, as in that case one might find justices on the north bank and the south bank of the River Thames deciding in different ways. It would be highly desirable to give a construction to these Acts which would leave no doubt on the subject, and as a matter of construction I think it is reasonably clear. Section 742 of the Merchant Shipping Act provides that a " 'Home trade ship' " includes every ship employed in trading or going within the " following limits; . . ." This ship was not going within the " following limits " because she was going to Oslo. If the ship were to go on a voyage and was going to call at one particular port within the limits and could then go on beyond the limits, the provision about home trade ships not carrying pilots would seem to me to be useless, because if it could be said the ship was going within the limits because she was going, for example, to any port on the French coast and need not therefore carry a pilot, and that she was then to be at liberty to go on to America or Australia or anywhere else, section 11 (4) of the Pilotage Act would seem to me to have a considerable gap left in it. I think that one must ascertain what voyage the vessel is engaged on at a particular time when the London Pilotage Authority says that she ought to have a pilot. The particular voyage on which the vessel was engaged here was from London to Oslo, and the fact that a ship is usually or regularly employed only between ports in the United Kingdom and ports in the northern parts of Europe which are within the home trade limits does not seem to me to indicate that, if she is going to a port outside those limits, she is a ship going within the limits.

Reliance has been placed upon section 11 (5) of the Pilotage Act, which is in the following terms: "For the purpose of this "section, a ship which habitually trades to or from any port or "ports outside the British Islands shall not be deemed to be "trading coastwise, and a ship which habitually trades to or from "any port outside the home trade limits shall not be deemed to "be a home trade ship, by reason only that she is for the time "being engaged on a voyage between ports in the British "Islands." This means no more than that a foreign-going ship does not become a home trade ship because when either outward or homeward bound she is sailing between two British ports at which she may have to call. It has no bearing on the present case.

I am glad to find that the construction which appeals to me in this matter is the same as that which appealed to a very great Admiralty judge, Sir James Hannen P., in *The Sutherland*,[1] where he construed similar words in an earlier Act. In that case he said[2]: "I agree that because a vessel is generally engaged in "trading to a port north of Boulogne, she would not be exempt "if she were not at the time on a voyage of this character, but if "a vessel is obliged for a temporary purpose to put into a port, "she does not, on that account, cease to be so engaged." I think that Sir James Hannen was there taking exactly the same view of this matter as I take. For these reasons I think that this appeal must be allowed. The case will be remitted to the justices with a direction to convict.

HILBERY J. I agree.

PEARCE J. I agree.

Appeal allowed.

Solicitors: *Freshfields; Sinclair, Roche & Temperley.*

E. M. W.

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[1] (1887) 12 P.D. 154.

[2] Ibid. 156.

WATSON *v.* NIKOLAISEN.

1955
April 26;
May 16.

Lord Goddard C.J., Hilbery and Pearce JJ.

Adoption—Consent of parent—"Abandoned"—Parent's consent to adoption given in mistaken belief that final and irrevocable—Subsequent withdrawal of consent—Whether parent "abandoned" child—Child not left to its fate—Making of adoption order in best interests of child—Parent not divested of parental rights and duties—Consent of parent required to adoption order—Offences against the Person Act, 1861 (24 *&* 25 *Vict. c.* 100), *s.* 27*—Children and Young Persons Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 12), *s.* 1*—Adoption Act,* 1950 (14 *&* 15 *Geo.* 6, *c.* 26), *s.* 3 (1) (*a*) (*c*).

Children and Young Persons—Abandonment. Justices—Case stated—Form—Inordinate length and confusion. Conflict of Laws—Scottish and English law—Construction of statute—Desirability for uniformity. "Abandoned."

Section 3 (1) of the Adoption Act, 1950, provides that the court may dispense with the consent of a parent to the making of an adoption order "if it is satisfied (*a*) . . . that he has abandoned, "neglected or persistently ill-treated the infant; . . . (*c*) . . . that "his consent is unreasonably withheld."

A mother, who had handed her child to friends by whom she desired it to be adopted, signed a form consenting to the adoption of the child in the belief that it was the final and irrevocable step in the adoption (although in fact it was not) and that she thereby, as she intended to do, gave up all rights in the child. Thereafter the mother made no contribution towards the maintenance of the child, and when the mother subsequently withdrew her consent to the adoption the adoptors contended that her consent was not required since she had abandoned the child, or, alternatively, that her consent had been unreasonably withheld:—

Held, (1) that the mother had not "abandoned" the child within the meaning of section 3 (1) (*a*), since far from leaving the child to its fate she had given it to persons who desired to adopt it and in whom she had confidence; in so doing the mother had not parted with her rights in the child or divested herself of her parental responsibilities towards it.

Dictum of Lord Dunedin in *Mitchell* v. *Wright* (1905) 7 F. 568, 574 applied.

In re "K." (an infant) [1953] 1 Q.B. 117; [1952] 2 T.L.R. 745; [1952] 2 All E.R. 877 considered.

Per curiam. "Abandoned" in section 3 (1) (*a*) connotes abandonment that would have rendered the mother liable to the criminal law: Offences against the Person Act, 1861, s. 27; Children and Young Persons Act, 1933, s. 1.

(2) That in adoption proceedings the welfare of the child is not the primary consideration, and although in the circumstances the mother might have forfeited her rights to the care and custody of the child, the withholding of her consent to its adoption was not necessarily unreasonable. Accordingly, an adoption order could not be made without her consent.

CASE STATED by Bury justices.

On October 13, 1952, the respondent, the mother of an illegitimate child then aged just over one year, which the appellants wished to adopt, handed the child to the appellants for that purpose. On November 24, 1952, the respondent signed a formal consent to the adoption of the child in the (erroneous) belief that the consent was final and irrevocable and that thereby she divested herself of all rights in the child. Since October 13, 1952, the child was in the sole care of the appellants, who brought it up as their own child, and from the beginning of 1953 the respondent made no contribution to the maintenance of the child and apparently took no interest in its welfare, only seeing the child on one occasion in July, 1954, when, at the instance of the appellants, it was brought to Glasgow on a visit to her. Throughout the material time the respondent drew the children's allowance in respect of the child and kept it for herself. For various reasons the appellants did not apply for an adoption order until June, 1954, and the hearing took place in October, 1954, by which time the respondent had discovered that she could withdraw her consent, had changed her mind and no longer desired that the appellants should adopt the child.

At the hearing of the application for an adoption order before the justices, when the appellants learnt for the first time that the respondent had changed her mind, the respondent refused to consent to the adoption, giving as her reasons for desiring to retain the child that she was in a highly nervous state due, in part, to the fact that she was repenting giving up her rights in the child and that she loved the child and wanted to bring it up herself.

It was contended, inter alia, on behalf of the appellants, that the respondent's consent was unreasonably withheld, or, alternatively, that she had abandoned the child within the meaning of section 3 (1) (*a*) of the Adoption Act, 1950,[1] and that, therefore, her consent to the adoption was not required.

It was contended, inter alia, on behalf of the respondent that in proceedings for adoption considerations affecting the welfare of the infant must be excluded and that the question which fell to be decided was whether the withholding of consent was unreasonable.

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[1] Adoption Act, 1950, s. 2 (4): "Subject to the provisions of section "three of this Act, an adoption order "shall not be made—(*a*) in any case, "except with the consent of every "person or body who is a parent or "guardian of the infant . . ." S. 3 (1): "The court may dispense with "any consent required by paragraph "(*a*) of subsection (4) of section 2 of "this Act if it is satisfied—(*a*) in the "case of a parent or guardian of the "infant, that he has abandoned, neg- "lected or persistently ill-treated the "infant . . . (*c*) in any case, that "the person whose consent is required "cannot be found or is incapable of "giving his consent or that his con- "sent is unreasonably withheld."

The justices found that worry concerning the parting with the infant to the appellants, and the signing of the consent form by which she thought that she had completely deprived herself of all further right to the infant, had played upon the respondent's nerves to the extent that she had now resolved that she must do whatever was possible to get her child back, and that that was strengthened by her belief that her own health would improve by so doing; that she was sincere in her desire to retake possession of the infant and had not acted whimsically in such desire; that when she had handed over the infant to the appellants she had believed at the time that it would be in the infant's best interests, but had changed her mind in good faith upon reasonable grounds.

The justices considered that had they been solely concerned with the welfare of the child they would have made an adoption order, but, since they were of the opinion that the respondent had not unreasonably withheld her consent and that she had not abandoned the child, they dismissed the application.

The appellants appealed.

The facts found by the justices are more fully set out in the judgment of the court.

J. E. S. Simon Q.C. and *J. W. Da Cunha* for the appellants. The respondent abandoned the child and, therefore, by section 3 (1) (*a*) her consent to an adoption order is not required. When she signed the formal consent she thought that it was final and irrevocable; she took every step to disburden herself of the child. To hand a child over and sever all connexion, and then to take what is believed to be an irrevocable step, amounts to "abandonment." See the Oxford English Dictionary, tit. "Abandon," vol. 1, p. 6, col. 3, in particular II. "To give up absolutely. "2. To give up to the control or discretion of another . . ."; and p. 7, col. 1, "8. To forsake, leave, or desert (a place, person, "or cause); to leave without one's presence, help, or support." There has been no English judicial construction of the word, but it was considered in its context in the Custody of Children Act, 1891, by the Irish Court of Appeal in *In re O'Hara* [2] (see in particular the remarks of Holmes L.J.[3]), and also by Lord Dunedin, Lord President, in *Mitchell* v. *Wright*.[4] It is submitted that the word "abandoned" in section 3 (1) (*a*) must be given its ordinary and natural meaning and should not be construed in the criminal sense of abandoning or exposing in a manner likely to cause unnecessary suffering or endanger health. The mother here, although she knew and approved the steps taken by the appellants for the maintenance of the child, had no idea, after 1952, what was happening to the child and can be said, in the words of Lord Dunedin,[5] to have "washed her hands of the "child."

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[2] [1900] 2 I.R. 232.

[3] Ibid. 252.

[4] (1905) 7 F. 568, 574.

[HILBERY J. Does every parent who consents to an adoption order abandon the child within the meaning of the Act?]

The question normally would not arise, because once an adoption order is made the natural parent is no longer regarded as a parent.

[LORD GODDARD C.J. If a parent were asked what had become of a child, and said that he had handed it over to some other person, could it be said that he had abandoned it, or abandoned it to someone else?]

It is a question of degree; there comes a time when the circumstances amount to abandonment. Handing a child over to another person or signing a consent form would not be enough, but signing the consent form in the belief that it is final is enough.

[HILBERY J. It is difficult to think that a parent who has made arrangements for the care and maintenance of a child by someone else abandons it. He has not left the child to its fate.]

If the child is handed over to someone else for a certain length of time that would not be abandonment, but again it is a question of degree, and if the child was handed over once and for all to be brought up by someone else, that would be abandonment.

The withholding of consent by the respondent was unreasonable, and the justices misdirected themselves in holding that it was not. In *Hitchcock* v. *W. B. and F. E. B.*[6] Devlin J. said[7] that the question was "Is consent being refused whimsically or "arbitrarily or not in good faith." The justices misunderstood the word "whimsically" to mean jocular and not the result of a whim and thereby applied the wrong test. Had they asked themselves was it an arbitrary decision rather than a reasonable one they might have come to a different conclusion. The court should consider whether the case ought to be remitted to the justices. Further facts must be ascertained before it can be said that the mother is not unreasonably withholding her consent, for example, whether she is really willing to bind herself to maintain the child. [Reference was made to *Hitchcock* v. *W. B. and F. E. B.*[8]] The case as stated leaves undetermined whether the withholding of consent is for a reason or for a whim; the respondent's request for the child was put forward against a background of her nervous disorder.

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[5] 7 F. 568, 575.

[6] [1952] 2 Q.B. 561; [1952] 1 T.L.R. 1550; [1952] 2 All E.R. 119.

[7] [1952] 2 Q.B. 561, 572.

The justices failed to consider the respondent's reason in the light of the circumstances of the case. Her sole reason for withholding consent was her desire to have the child with her because her health was suffering without it. *In re "K." (an infant)*[9] can be distinguished, for there the consent was withdrawn in under two months; and it is submitted that all that was held in that case was that a mere withholding of consent was not unreasonable and that the welfare of the child was not a consideration. The decision of the Court of Appeal left open what was said by this court in *Hitchcock* v. *W. B. and F. E. B.*[10] as to what might be unreasonable, and the remarks of Devlin J.[11] as to the indirect significance of the welfare of the child were not disapproved. In *In re "K." (an infant)*[12] the Court of Appeal[13] also contrasted abandonment with contributing to maintenance.

[HILBERY J. I am sure that Parliament attached the utmost importance to the necessity for showing that withholding of consent by a parent is unreasonable. The section must be considered in the context of the three months' probationary period, and the words "neglected or persistently ill-treated" suggest that some degree of culpability, at least in abandonment, is required.]

Equally the section creates a genus, not of culpability, but of non-fulfilment of parental duties. If the wording of the earlier Acts, for example, the Children and Young Persons Act, 1933, s. 1, and the Offences against the Person Act, 1861, s. 27, is compared, the present Act has omitted the element of culpability in this context. A parent who has "washed his hands of the "child" is not a person to whom the court should listen.

Melford Stevenson Q.C. and *Conrad Dehn* for the respondent mother. "Abandoned" in its context in section 3 (1) (*a*) involves misconduct or dereliction of duty by a parent. The use of the words "neglected or persistently ill-treated" show that some degree of moral turpitude is implied, and see the judgment of

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[8] [1952] 2 Q.B. 561.

[9] [1953] 1 Q.B. 117; [1952] 2 T.L.R. 745; [1952] 2 All E.R. 877.

[10] [1952] 2 Q.B. 561.

[11] Ibid. 572.

[12] [1953] 1 Q.B. 117.

[13] Ibid. 130.

Jenkins L.J. in *In re* " *K.*" (*an infant*),[14] which, although dealing with another subject-matter, was clearly contemplating that any one of the three verbs in section 3 (1) (*a*) amounted to misconduct or dereliction of duty. The language used by Lord Dunedin in *Mitchell* v. *Wright*,[15] which shows that he thought that " abandoned " necessarily implies not knowing or caring what the fate of the child will be, is relied on. A parent who leaves a child in circumstances in which he knows or has reason to believe that it will be cared for by other people does not lay down his parental obligations or abandon the child in any sense involving moral turpitude. An adoption order extinguishes all the obligations and rights of a parent: see section 10. That section must be borne in mind when considering section 3, for where such consequences ensue the Act must be construed in favour of persons whose rights are lost.

[LORD GODDARD C.J. Section 3 is concerned with the necessity for the consent of the parent and the circumstances in which the court can dispense with it. If a mother said " I do not want " my child; take it. I do not want anything more to do with it " and wash my hands of it," would her consent be required if the person who took the child sought to adopt it?]

There is a difference between the case of a parent who leaves a child in circumstances where there is a belief that it will be cared for, and where a parent leaves it not knowing whether it will be looked after or will suffer; that is where the element of moral turpitude comes in. If there is a reasonable expectation that the child will be looked after, there is no abandonment.

The wording used in the earlier Acts throws light on the present Act. In section 1 (1) of the Children and Young Persons Act, 1933, " abandoned " obviously contemplates ill-treatment. While the Act of 1933 creates offences and imposes penalties it contains no provision that in consequence of those offences a parent shall be deprived of parental rights. If abandonment involves culpability it is clear that there was no culpability of that kind in the present case.

[LORD GODDARD C.J. We need not trouble you on the question whether the withholding of consent was unreasonable.]

J. E. S. Simon in reply. Holmes J. in *In re O'Hara*[16] indicated that there was no sure distinction between the words " abandoned " and " deserted " in sections 1 and 3 (*a*) of the

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[14] [1953] 1 Q.B. 117, 129, 130.

[15] 7 F. 568, 574.

[16] [1900] 2 I.R. 232, 252.

Custody of Children Act, 1891. The same phrase as used in that Act was used in section 2 (3) of the Adoption of Children Act, 1926, but the word "deserted" was omitted from the Act of 1950. Where two words have been used in earlier Acts and one has been dropped it is right to look at the distinction between them. There cannot, for example, be desertion by handing over to good foster parents, but there can be abandonment. Desertion always involves an element of culpability, but abandonment does not. In *In re "K." (an infant)* [17] the parent contributed to the support of the child and visited it from time to time. The essence of the present case is that the mother intended to hand the child over irrevocably; that, coupled with the rest of her conduct, amounts to abandonment.

Cur. adv. vult.

May 6. LORD GODDARD C.J. read the following judgment of the court.

This is a special case stated by the justices for the county borough of Bury to whom the appellants applied for an order under the Adoption Act, 1950, authorizing them to adopt an infant girl, one Roberta Jones Nikolaisen, born on July 30, 1951, the natural child of the respondent. The justices refused to make the order on the ground that they could not find that the respondent had either abandoned the infant or had unreasonably withheld her consent to the adoption and the question they submit to the court is whether on the facts found they were justified in so holding.

Now while I gladly acknowledge the great care and industry which the justices showed in deciding this case, it is certainly unfortunate that they were not assisted to state the special case in the form which over and over again this court has laid down as the proper way. The case they have stated is of inordinate length, running to some 37 pages of type, certainly the longest I have ever seen, and though the justices purport to state their findings of fact, such findings are inextricably confused with the evidence, long extracts from letters and the statutes, describing the mental processes by which the justices came to their conclusions and the various opinions and so forth of witnesses who were called before them. The court has had great difficulty in disentangling from this mass of paper the essential facts which, indeed, seem to be quite short; and, I hope, in the recital which

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[17] [1953] 1 Q.B. 117.

I am now about to make I am not guilty either of over-simplification or of omitting any points of importance. The following seem to be the essential matters.

The respondent was married to a Norwegian seaman who deserted her in the year 1946. By him she had at least four children, two boys, neither of whom are living with her now, and two girls who are at present living with her; they presumably are legitimate, though whether legitimate or not is immaterial in this case. After her husband deserted her she returned to this country, or to Scotland, from Norway and formed an association with a man named Mooney, who is admittedly the putative father of the child in question who was born late in July, 1951. Following her association with Mooney she lived with a man named Doolan, and then with another man named Rodden, with whom she is at present living, and by one or other of these men she has had another child now aged about two years. She is at present living with the man Rodden in one room in Glasgow with the infant child last mentioned, and the two girls of her marriage, and these three children, the respondent and Rodden all live in one room. The appellants were friends of the respondent. They were married on September 15, 1951, shortly after the birth of the child in question. For reasons into which it is unnecessary to go the appellants were anxious to adopt the respondent's child and the respondent was perfectly willing that they should do so. Accordingly, proceedings were instituted in October, 1952, to obtain an adoption order from the justices at Ellesmere in Shropshire. The respondent signed the necessary form of consent to the adoption and the justices in the present case are satisfied that she understood the consequences of the step she was taking in signing the form of consent, and that she thought it was a final step which would completely dispossess her of her child and of any right to control its future upbringing. They also find that she was unaware at that time of her right to change her mind and to appear at the hearing of the application for the adoption order and object to its being granted. The child had been handed to the appellants and, so far as we can see, there is no reason to suppose that had the application for the adoption order been pursued it would not have been granted.

Before the application was heard the appellants moved away from Ellesmere, and went to live at Bury, and accordingly the appellants were advised that any application for adoption should be made to the justices of the latter town. They were also

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advised by the children's officer at Bury not to make the application until they had a home of their own, and in fact they did not make the application until June 2, 1954, and the hearing took place on October 29. Meanwhile the infant had remained all this time with the appellants. The mother had never visited her and had only seen her once, namely, in July, 1954, when the appellants took the child to Glasgow and called on the mother and, I think, in fact stayed for a few days with her. The child seems to have been entirely supported by the appellants and brought up as their own. The mother never contributed to its maintenance, but I regret to say that she drew the children's allowance in respect of the child and kept it for her own purposes. By the time the case came before the justices at Bury the mother had apparently changed her mind and had discovered that it was possible for her to withdraw the consent that she had previously given.

It does not appear, so far as I am aware, that she had ever signed a consent for the proceedings in the Bury court, but the papers, I understand, had been sent from Ellesmere to Bury and, no doubt, her consent might have been accepted if it had not been that she attended the hearing and objected. Her reasons for saying that she desired to retain the child were that she was fond of the child, though she never seems to have displayed any affection towards it, and that she was in a highly nervous condition due, in part, to the fact that she was repenting giving up her rights in the child. On these facts, which I hope I have summarized fairly, the justices came to the conclusion that she had not abandoned the child, and that she genuinely desired that the child should remain hers and not be adopted. Accordingly, after referring to the decided cases on the subject, they came to the conclusion that they could not hold that her refusal to consent was unreasonable although they were satisfied that, if the question had been what was for the benefit of the child, they would have held that the child should remain with the appellants. Accordingly, they refused to make the order.

The question that was mainly argued by Mr. Simon on behalf of the appellants was that on these facts the mother had abandoned the child. By section 3 of the Act it is provided that the court may dispense with the consent of a parent of an infant if the parent has abandoned, neglected or persistently ill-treated the infant. Now I admit that, at first, I was very much attracted to the view submitted by Mr. Simon that the mother could be said here to have abandoned her child because in the proceedings which had been instituted at Ellesmere she had deliberately consented to the adoption believing that she thereby gave up all rights in the child and intended so to do, although she did not know that she could have withdrawn her consent. Certainly until the proceedings in 1954 she never indicated by word or deed that she desired to withhold her consent or that she had in any way changed her attitude. The only thing that she had ever done in relation to the child was to take the allowance that the State made towards the child's maintenance and keep it for herself. On consideration, however, I am satisfied that the mother has not abandoned the child as contemplated by the section. She was not leaving the child to its fate; she was giving it over to people who desired to adopt it and in whom she had confidence, and when one finds that section 3 deals with abandonment, neglect or persistent ill-treatment, I think it is clear that abandonment means abandonment that would have rendered her liable to the criminal law. Section 27 of the Offences against the Person Act, 1861, provides: "Whosoever shall unlawfully "abandon or expose any child, being under the age of two years, "whereby the life of such child shall be endangered, or the health "of such child shall have been or shall be likely to be permanently "injured, shall be guilty of a misdemeanour," and under section 1 of the Children and Young Persons Act, 1933, a person who wilfully neglects, abandons or exposes a child in a manner likely to cause him unnecessary suffering or injury to health is also liable to punishment. It is clear that the mother did not abandon her child in this sense at all.

In a very similar case under the Custody of Children Act, 1891, *Mitchell* v. *Wright*,[1] Lord Dunedin, then Lord President, said[2]: "I think that the words 'abandoned or deserted the "'child' point at the parent leaving the child to its fate. But "in this case, although the petitioner did little for her child, she "never really abandoned or deserted it, because she knew and "approved of the steps which the respondent took for its "maintenance." The facts in that case were that the mother had entrusted her illegitimate child for more than seven years to the care of a cousin. The real position in the present case is that proceedings had been started at Ellesmere, but unless and until an order of adoption was made, and it never was, the mother had not only not parted with all her rights in the child, but had certainly not divested herself of her responsibility towards it as its parent. She may have thought that she had rid herself both of her child and all her responsibilities to it, but in that she was mistaken. Until the adoption order was made it would have been open to the present appellants, had they so desired, to have returned the child to the mother and refused to keep it, and if they had returned it to her she could not have avoided her duties as a parent and would have been guilty of a criminal offence if she had not taken due steps to provide for and protect the child. In my opinion the justices were right in coming to the conclusion that the mother had never abandoned her child up to the time that the case came before them at Bury.

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[1] (1905) 7 F. 568.

[2] Ibid. 574.

With regard to the question whether the mother had unreasonably withheld her consent the justices appear to me to have applied their minds to the right point. They considered the cases of *Hitchcock* v. *W. B. and F. E. B.*[3] and *In re* "*K.*" (*an infant*),[4] where this court held in the first case and the Court of Appeal in the second that in adoption proceedings, unlike proceedings for care and custody, the welfare of the child is not the primary consideration. The parent may have forfeited his or her rights to have the care and custody of a child, but it is quite another thing to say that, because of that, he or she must give a consent to the child being adopted so that it becomes a member of the family of the adopting parents and the natural parents lose all parental rights in relation to the child.

I am aware that in *In re* "*K.*" (*an infant*) [4] the Court of Appeal said [5]: "we would say that such withholding of a parent's consent "cannot be held unreasonable merely because the parent has in "circumstances such as those of the present case placed the child "in the care of foster-parents, without in any sense abandoning "it, but on the contrary contributing towards its support and "visiting it from time to time." That does look at first sight as though the court did consider that a parent could be said to have abandoned the child by placing it in somebody else's care and never contributing towards it, but that is one passage in a very long judgment and in which the point which we have to consider was not being considered. The view of the Lord President already referred to in the Scottish case [6] is directly in point and, as I have often pointed out in other cases, it would be very unfortunate for a statute to be construed in different senses on either side of the border. There is certainly high dictionary authority supporting what was apparently Lord Dunedin's view that "abandon" or "desertion" in the context in which he was construing them have the same meaning. The Oxford English Dictionary gives as one of the meanings of abandon "to desert," and if one turns to see the meanings given by that same high authority to the word "desert" one finds that the first meaning given is "to abandon." It is significant, however, that after giving the meaning desert to the word abandon the dictionary goes on to add "leave without . . . help." It is true that in *Mitchell* v. *Wright*[7] Lord Dunedin was considering the provisions of another Act, but it was one closely akin to the present and for this purpose there can be no distinction between them. The courts have never laid down, and probably never will, what can amount to an unreasonable withholding of consent.

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[3] [1952] 2 Q.B. 561.

[4] [1953] 1 Q.B. 117.

[5] Ibid. 130.

[6] 7 F. 568, 574.

The justices found in the present case, and it was certainly open to them to do so, that the mother has affection for the child and does desire that it should remain a member of her family, and it is perhaps not inappropriate to remember that in the first letter that she wrote on the subject to the appellants she stressed her desire that they should allow the child to retain her baptismal name of Roberta as it was the respondent's father's name and she was his only namesake.

The result is that the answer to the questions submitted to us are in the affirmative, and we dismiss this appeal. We cannot, however, leave the case without expressing the hope that our decision will not be quoted, should any proceedings hereafter take place with regard to the care and custody of this child, as indicating our view that the child should be returned to its mother, for we are certainly not doing so. For a little girl to be brought up in the atmosphere that she would be if she is returned to her mother, a woman who has lived with at least three different men since her husband deserted her and is living in an unmarried state with one of them, with children partly the legitimate offspring and one at least illegitimate, and all of them living in one room, is certainly not a state of affairs that this court would encourage. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Woodcock, Ryland & Co., for Woodcock & Sons, Bury; Gregory, Rowcliffe & Co., for Hall & Smith, Bury.*

J. F. L.

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[7] 7 F. 574.

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April 27, 28, 29;
May 2.

Singleton, Jenkins and Morris L.JJ.

LLOYDS BANK LD. AND OTHERS *v.* JONES.

Landlord and Tenant—Covenant—Waiver of breach—Tenant's covenant to inhabit farm—Death of tenant—Liability of trustees of will—Acquiescence in one trustee only inhabiting farm—Effect—Agricultural holding—Notice to quit—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 24 (2) (*d*).

Court of Appeal—County court—Appeal from—Jurisdiction—Consultative case from arbitrator under Agricultural Holdings Act—"Decision" of county court judge—"Direction"—Whether appeal lies from decision of county court judge—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *s.* 105—*Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 77 (1), *Sch. VI, para.* 24.

Agriculture—Agricultural holding—Notice to quit. Waiver. Estoppel by conduct. Arbitration—Agricultural holding.

By a tenancy agreement relating to an agricultural holding it was provided that the tenant would, during the tenancy, at all times personally inhabit the farmhouse. The tenant in 1923 then died, and by his will his widow and another became trustees holding the legal estate in the tenancy. The widow resided on the farm until her death in 1950. Neither the other trustee nor his successor, then the sole surviving trustee, did so.

The then landlords served notice to quit on the tenant (the surviving trustee) on the ground of breach of the covenant; the respondent served a counter-notice to refer the dispute to arbitration under the Agricultural (Control of Notices to Quit) Regulations, 1948. The arbitrator, at the request of the parties, stated a special case for the opinion of the county court judge on the question "whether a person who as trustee under a will becomes, as such, "entitled to the interests of the tenant under a tenancy agreement "was bound by the covenant personally to inhabit the farmhouse." The county court judge held that the trustee was so bound, and was in breach, but that there had been in law a waiver by the landlords of the breach. The landlords sought to appeal against this finding of the judge:—

Held, that the finding of the county court judge was a "decision" on a question of law arising in the course of an arbitration, and might equally be described as a "direction" within the meaning of those words in section 105 of the County Courts Act, 1934[1]; and that accordingly an appeal lay to the Court of Appeal.

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[1] County Courts Act, 1934, s. 105: "If any party to any proceedings in "a county court is dissatisfied with "the determination or direction of "the judge in point of law or equity "or upon the admission or rejection "of any evidence, the party aggrieved "by the judgment, direction, decision "or order of the judge may appeal "therefrom to the Court of Appeal in "such manner and subject to such "conditions as may be for the time "being provided by the rules of the "Supreme Court."

Agricultural Holdings Act, 1948, s. 77: "(1) Any matter which by or

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In re Knight and the Tabernacle Permanent Building Society [1892] 2 Q.B. 613; 8 T.L.R. 783 distinguished.

The court having heard arguments on the appeal:—

Held, that clause 15 of the tenancy agreement was a covenant which ran with the land, and the respondent, as trustee, was bound by it and was in breach thereof; and that, assuming (without deciding) that the effect of clause 15 was that both trustees were required to reside on the farm, the landlords' acquiescence in only one doing so between 1923 and 1950 did not raise the inference of a release of the covenant.

Per Morris L.J. Once they had completed their duties as executors each one of the trustees was bound by the terms of clause 15 to reside on the farm.

Hepworth v. *Pickles* [1900] 1 Ch. 108 and *Gibbon* v. *Payne* (1906) 22 T.L.R. 54 distinguished.

APPEAL from Judge Rowe Harding, sitting at Ludlow County Court.

By an agreement made on October 13, 1893, between H. J. Allcroft, of Stokesay Court, Salop (who and whose heirs and assigns are hereinafter referred to as "the landlord") of the one part, and Edward Bach and Francis Bach of Onibury, Salop, jointly and separately either and both of whom (who and whose executors, administrators and assigns are hereinafter referred to as "the tenant") of the other part, the landlord agreed to let, and the tenant agreed to take, all that dwelling-house, with the buildings, cottages and lands and all appurtenances thereto, called Lower Onibury Farm situate in the parish of Onibury, containing 345 acres or thereabouts, to hold the same for one year from March 25, 1893, and afterwards from year to year until the tenancy should be determined by either party giving six calendar months' previous notice in writing to determine at the end of the first or any subsequent year.

Clause 15 of the agreement provided: "The tenant will not "during this tenancy assign, let or part with the possession of "the farm or any part thereof, but will at all times during the

"by virtue of this Act or regulations "made thereunder is required to be "determined by arbitration under this "Act shall, notwithstanding any "agreement, under a contract of "tenancy or otherwise, providing for "a different method of arbitration, "be determined by the arbitration "of a single arbitrator in accordance "with the provisions of the Sixth "Schedule to this Act, and the "Arbitration Acts, 1889 to 1934, shall "not apply to any such arbitration."

Sch. VI, para. 24: "The arbitrator may at any stage of the proceedings, and shall, upon a direction in that behalf given by the "judge of the county court upon an "application made by either party, "state in the form of a special case "for the opinion of the county court "any question of law arising in the "course of the arbitration."

"tenancy personally inhabit the farmhouse on the farm and "cottages with his family and servants. . . ."

By his will Frank Dawes Bach, who had become the tenant and who died in August, 1923, appointed his widow, Minnie May Bach, and Harry Bach, his executors and trustees of his will. The widow resided on the farm until her death on May 8, 1950. In 1934 George Bernard Jones was appointed a trustee of the will of F. D. Bach, Harry Bach having surrendered his trusteeship. On the death of the widow it was admitted that Jones, as the surviving trustee, became the legal holder of the tenancy, and he continued to pay the rent to the landlord. He farmed adjoining land, on which he resided, leaving the farmhouse on the Lower Onibury farm to be inhabited by Mrs. Dorothy Mary Norsworthy, a daughter of Frank Dawes Bach and a beneficiary under his will. Mrs. Norsworthy's husband cultivated the farm.

On December 23, 1952, the solicitors for the present landlords, Lloyds Bank Ld., A. R. Allcroft and Lady Jewell Magnus-Allcroft, trustees of the will of H. J. Allcroft, wrote to the solicitors acting for the tenant, pointing out that he, as the last surviving trustee of Frank Dawes Bach and therefore the legal holder of the tenancy, was in breach of clause 15 of the tenancy agreement, and calling upon him to remedy that breach by inhabiting the farmhouse. On March 6, 1954, the tenant having failed to remedy the alleged breach, the landlords, by their solicitors, served notice on the tenant, pursuant to section 24 (2) (*d*) of the Agricultural Holdings Act, 1948, to quit and deliver up possession of the farm. On March 30, 1954, the tenant served on the landlords a counter-notice under section 26 of the Act, claiming that the matter be referred to arbitration under the Agricultural (Control of Notices to Quit) Regulations, 1948.

The dispute duly came before Mr. Thomas Hugh Evans, of School Gardens, Shrewsbury, Fellow of the Royal Institution of Chartered Surveyors, as arbitrator, and at the request of the parties he stated a special case under paragraph 24 of the Sixth Schedule to the Act of 1948 for the opinion of the judge of the Ludlow County Court on the following question of law: "Whether "a person who as trustee under a will becomes as such entitled "to the interest under the tenancy agreement of the former "tenant of a holding is bound by the clauses in the agreement "relating to that holding and in particular is bound by clause 15 ". . . namely, personally to inhabit the farmhouse on the farm, "on the ground that such trustee is the 'tenant' within the

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"meaning of the tenancy agreement and the said [Agricultural "Holdings] Act."

The arbitrator included in the case stated a summary of the submissions of the parties but he did not state any facts found by himself.

The county court judge found that every trustee for the time being was at all times after the completion of the duties of executorship bound by the clause requiring residence on the farm. It followed that Jones was so bound from the time when he was first appointed in 1934. There had, however, been a breach of such clause so continuously, without protest by the landlords, as to be in law a waiver or release of the breach, and the landlords were estopped from relying upon it as a ground of forfeiture.

The landlords appealed from that finding.

Michael Albery Q.C. and *Douglas Draycott*, for the tenant trustee, took a preliminary point of law as to competency of the appeal. It is submitted that there can be no appeal from a decision of a county court judge on a case stated by the arbitrator in an arbitration under the Agricultural Holdings Act, 1948. There is a principle of law, well established by authority, that where a statute confers upon the court a consultative jurisdiction, as opposed to a judicial jurisdiction, no appeal lies from the opinion of the court unless such a right is expressly conferred by the statute. This special case was a consultative case. The parties, under machinery of the Act, having put in something in the nature of pleadings, the arbitrator had to determine whether the tenant had committed a breach of a covenant, and without hearing evidence he stated a case for the opinion of the county court judge under paragraph 24 of the Sixth Schedule to the Act, as to whether such a clause as clause 15 was binding on a trustee. By agreement of the parties the judge treated the point of law as broadly before him, and he held that the covenant was binding on the trustee but that it had been waived. The arbitrator may, but is not bound to, accept the decision of the county court judge. It is not a judicial determination but merely advice as to the law. While the matter is still at large and the facts have to be found by the arbitrator it is undesirable to encourage appeals which may go a long way up to superior courts. When the arbitration has been concluded there will be a right to move to set aside the award on the ground of error in law on the face of it. At the moment none of the facts which the arbitrator is going to find are known and it is contended by the tenant that the notice to quit was not reasonable. There might be a case in which the trustee was a bank or an insurance company, and the covenant in clause 15 would be impossible of performance. In *In re Knight and the Tabernacle Permanent Building Society* [2] it was held that "no appeal lies from the decision of the High Court "upon a special case stated by an arbitrator with regard to a "question of law arising in the course of the reference under "section 19 of the Arbitration Act, 1889," and Lord Esher M.R. described the jurisdiction as "only consultative" and "nothing "which amounted to a judgment or order."

The Agricultural Holdings Act, 1923, by section 16 (4), provided: "If in any arbitration under this Act the arbitrator states "a case for the opinion of the county court on any question of "law, the opinion of the court on any question so stated shall be "final unless within the time and in accordance with the con-"ditions prescribed by Rules of the Supreme Court either party "appeals to the Court of Appeal, from whose decision no appeal "shall lie." The Act of 1948 is described as a consolidation Act, but there is nothing parallel to section 16 (4) in it, and there are a number of differences which show that it is also an amending Act. [*In re Jones and Carter's Arbitration* [3] and *Tata Iron and Steel Co. Ld.* v. *Bombay Chief Revenue Authority* [4] were also cited.]

Kenneth Elphinstone for the landlords. If this point is decided in favour of the trustee it will be a decision of supreme general interest, because since 1923 appeals have constantly been coming up from the county courts to this court. In view of the terms of section 16 (4) of the Agricultural Holdings Act, 1923, the decision of the county court judge will be final unless either party exercises the right of appeal under the Supreme Court Rules. Section 105 of the County Courts Act, 1934, gives a right of appeal to any party aggrieved by the determination or direction of the county court judge, and it is submitted that putting together paragraph 24 of the Sixth Schedule to the Act of 1948 and section 105 of the County Courts Act it is a pure question of construction.

[SINGLETON L.J. With section 105 in operation can it not be said that paragraph 24 of the Sixth Schedule gives the go-by to a distinction between consultative case and final case?]

It matters not which way the arbitrator states his case. The fact that no distinction is made in the 1948 Act supports that view. There is no doubt that this hearing by the county court judge on a case stated under the Agricultural Holdings Act is a proceeding within section 105 of the County Courts Act, 1934. The reason why the Act of 1948 contained no enactment equivalent to section 16 (4) of the Act of 1923 was because it had been found unnecessary to provide for an appeal to the Court of Appeal, such a right being already in existence. If it had been intended by the 1948 Act to take away the right of appeal given by section 16 (4) the draughtsman would have been content to leave in all the words of that section down to the words "shall be final."

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[2] [1892] 2 Q.B. 613.

[3] [1922] 2 Ch. 599.

[4] (1922) 39 T.L.R. 288.

April 28. Their Lordships delivered the following judgments on the preliminary point.

SINGLETON L.J. Towards the conclusion of his judgment or decision the county court judge said: "Accordingly, I answer "the question propounded by the arbitrator by saying that "although the trustees of the will of Francis Bach, deceased, "were originally bound by clause 15 of the said agreement "personally to inhabit the farmhouse on the farm, there has "been a breach of such clause continuously since 1923, first by "Harry Bach, and then by the respondent, successively trustees "in whom the legal estate was vested jointly with Minnie Bach, "that there was no protest in respect of such breaches by the "landlords between 1923 and 1951, and that whether such failure "to protest is measured as from 1923 or from 1934, when the "respondent became trustee, it is in law a waiver or release of "the said breach of the said clause 15, and the landlords are "estopped from relying upon it as a ground of forfeiture, or as a "breach by the tenant of a term or condition of his tenancy "within the meaning of section 24 (2) (*d*) of the Agricultural "Holdings Act, 1948."

The decision of the county court judge was thus in favour of the tenant. It appears that he went beyond the question raised in the case submitted to him, and that he did so at the request of counsel and, maybe, on some agreed statement of facts. The landlords gave notice of appeal against that decision, and Mr. Albery, who appears for the tenant, took a preliminary objection that there was no right of appeal in this case.

It is said on behalf of the tenant that when the arbitrator submitted a case to the county court judge it was to obtain the opinion of the judge during the course of the arbitration; that it was in no sense a final direction that was asked for; and that, as

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there was no more than a consultative case, there was no appeal from the decision of the county court judge. The submission was based upon the decision of the Court of Appeal in *In re Knight and the Tabernacle Permanent Building Society*,[1] in which it was decided: "No appeal lies from the decision of "the High Court upon a special case stated by an arbitrator with "regard to a question of law arising in the course of the reference "under section 19 of the Arbitration Act, 1889." Section 19 provided for the taking of the opinion of the court by way of consultative case.

Lord Esher M.R. said[2]: "The enactment now in question "provides that 'any referee, arbitrator, or umpire may at any "'stage of the proceedings under a reference, and shall, if so "'directed by the court or a judge, state in the form of a special "'case for the opinion of the court any question of law arising "'in the course of the reference.' The words are not 'for the "'"determination" or "decision" of the court'; so that there "is not the prima facie difficulty which existed in the case where "the statute spoke of the 'decision of the court.' It appears "to me that what the statute in terms provides for is an "'opinion' of the court to be given to the arbitrator or umpire; "and that there is not to be any determination or decision which "amounts to a judgment or order. Under those circumstances, "I think that there is no appeal. I base my decision on the "words of the statute; but when I consider the result of holding "otherwise, I am fortified in the conclusion at which I have "arrived. It seems to me that it would be most inexpedient "that, where an opinion is given by the court under this statute "in the course of a reference for the guidance of arbitrators, there "should be an appeal which might be carried up to the House of "Lords."

Bowen L.J. said[3]: "It appears to me that this consultative "jurisdiction of the court does not result in a decision which is "equivalent to a judgment or order." Kay L.J. said[4]: "With "regard to the first point, I am much influenced by the con-"sideration that the Act now in question relates to arbitrations. "One of the advantages of arbitration is that the award of the "arbitrator is final and there is no appeal from it. Therefore, "where an Act dealing with arbitration gives an incidental power "to an arbitrator to state a case or to the court to compel him "to state one for the opinion of the court, I should expect, if it

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[1] [1892] 2 Q.B. 613; 8 T.L.R. 783.

[2] [1892] 2 Q.B. 613, 617.

[3] Ibid. 619.

[4] Ibid. 620.

"were intended that the opinion expressed by the court on that "case should be the subject-matter of appeal, that such an "intention would be most explicitly stated in the Act. There is "nothing of the kind in this Act. Accordingly it is sought to "make out that there is an appeal under the provisions of the "Judicature Act which give an appeal from any 'judgment or "'order' of the High Court. I think that it is impossible, "looking to the language of the Arbitration Act, to say that the "opinion given on the special case stated under section 19 is a "judgment or order."

The words "judgment or order" in the Judicature Act, 1873, are repeated in section 27 of the Judicature Act, 1925; there is an appeal to the Court of Appeal from any "judgment or order" of the High Court. The effect of the decision of the Court of Appeal in the *Tabernacle* case[5] is that a case stated under section 19 of the Arbitration Act, 1889, did not lead to a "judgment or order" within the meaning of those words in the Judicature Act, and there being no right of appeal expressly given, no right of appeal arose.

I draw attention to two matters: first, that the Arbitration Act, 1889, did not apply, nor do its successors apply, to arbitrations under the Agricultural Holdings Acts, as appears from section 27 (1) of the Agricultural Holdings Act, 1948. (See also section 13 (4) of the Act of 1908.) Secondly, by section 9 of the Arbitration Act, 1934 (repeated by section 21 of the Arbitration Act, 1950), a change was made whereby there could be an appeal on a consultative case so long as the leave of the High Court or of the Court of Appeal was obtained. In that sense there has been an extension.

It is necessary to look at the Agricultural Holdings Act, 1948, and at its predecessors. I think it is agreed by Mr. Albery that until the Act of 1948 came into operation there was a right of appeal from the decision of a county court judge upon a case stated, but since the Act of 1948 it is submitted that there is no such right.

The Agricultural Holdings Act, 1908, by section 13, provided: "(1) All questions which under this Act or under the contract of "tenancy are referred to arbitration shall, whether the matter "to which the arbitration relates arose before or after the passing "of this Act, be determined, notwithstanding any agreement "under the contract of tenancy or otherwise providing for a

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[5] [1892] 2 Q.B. 613.

"different method of arbitration, by a single arbitrator in accord-"ance with the provisions set out in the Second Schedule to this "Act." The Second Schedule to the Act provided in paragraph 9: "The arbitrator may at any stage of the proceedings, "and shall if so directed by the judge of the county court (which "direction may be given on the application of either party), "state in the form of a special case for the opinion of that court "any question of law arising in the course of the arbitration." Turning back to section 13 (3), one finds the provision: "If in "any arbitration under this Act the arbitrator states a case for "the opinion of the county court on any question of law, the "opinion of the court on any question so stated shall be final, "unless within the time and in accordance with the conditions "prescribed by the Rules of the Supreme Court either party "appeals to the Court of Appeal, from whose decision no appeal "shall lie."

Mr. Albery spoke of that subsection as one giving a right of appeal to the Court of Appeal, but when the subsection is examined, it is clear, I think, that it does not. It presupposes a right of appeal, and says that the decision of the county court judge "shall be final, unless within the time and in accordance "with the conditions prescribed by the Rules of the Supreme "Court either party appeals to the Court of Appeal, from whose "decision no appeal shall lie." Other appeals from the county court ordinarily went at that time to the Divisional Court. The Agricultural Holdings Act, 1908, provided by the subsection which I have read that an appeal in such a case under the Agricultural Holdings Act should be to the Court of Appeal, and that the decision of the county court judge was to be final, unless within the time provided by the Rules of the Supreme Court notice of appeal to the Court of Appeal was given.

That provision was repeated in the Agricultural Holdings Act, 1923, by section 16 (4). Section 16 deals with a matter referred to arbitration, and brings in the Second Schedule, which again, by paragraph 10, provides that a case may be stated for the opinion of the judge of the county court. Section 16 (4) repeats, word for word, section 13 (3) of the Act of 1908. So the law remained until the year 1948. There is no like provision in the Act of 1948, upon which Mr. Albery claims there is no right of appeal to the Court of Appeal on any question submitted to a county court judge and decided by him.

It would strike one as somewhat surprising if a right of appeal existing until 1948 was taken away, when in 1934 the legislature in the case of other arbitrations gave a right of appeal, with the leave of the court, on a consultative case. It appears to me that the fallacy in this argument—and I hope I shall not be accused of discourtesy in so describing it—arises from regarding the right of appeal as given by section 13 (3) of the Act of 1908, or by section 16 (4) of the Act of 1923. It does not arise in that way at all. The right of appeal arises under the County Courts Act, 1934.

Section 120 of the County Courts Act, 1888, provides: "If "any party in any action or matter shall be dissatisfied with the "determination or direction of the judge in point of law or equity, "or upon the admission or rejection of any evidence, the party "aggrieved by the judgment, direction, decision, or order of the "judge may appeal from the same to the High Court, in such "manner and subject to such conditions as may be for the time "being provided by the Rules of the Supreme Court regulating the "procedure on appeals from inferior courts to the High Court." Thus a right of appeal was given to "the party aggrieved by the "judgment, direction, decision, or order of the judge" where the party is "dissatisfied with the determination or direction of the "judge in point of law."

The like provision is contained in section 105 of the County Courts Act, 1934: "If any party to any proceedings in a county "court is dissatisfied with the determination or direction of the "judge in point of law or equity or upon the admission or "rejection of any evidence, the party aggrieved by the judg-"ment, direction, decision or order of the judge may appeal "therefrom to the Court of Appeal in such manner and subject "to such conditions as may be for the time being provided by "the Rules of the Supreme Court."

The intention of the legislature is clear: an appeal from the county court lies upon a point of law. It was not intended that there should be an appeal upon fact, and the statute does not give an appeal upon fact. But in giving a right of appeal from the county court upon a question of law, the statutes go further than those which regulate appeals from a High Court judge to the Court of Appeal. There is an appeal, not only from a "judgment "or order," but from a "judgment, direction, decision or order." If it is said that the decision of a county court judge upon a case submitted to him under the Agricultural Holdings Act does not lead to a "judgment or order," Mr. Elphinstone claims in aid the further words of section 105 of the County Courts Act, 1934, "direction or decision." He submitted to this court that the

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county court judge did as he was asked to do: he decided a certain point, and he gave a direction upon that point. Mr. Elphinstone claimed that there can be under section 105 of the County Courts Act, 1934, an appeal against the decision of the judge just as there could have been under section 120 of the County Courts Act, 1888.

In 1934 a change was made by the Administration of Justice (Appeals) Act of that year, by which, by Part I of the Schedule, appeals from the county court were in future to lie to the Court of Appeal instead of to the Divisional Court. When the County Courts Act, 1934, was passed, section 105, which I have already read, repeated the provision that appeals from the county courts were to be heard by the Court of Appeal. It appears to me that the reason for section 13 (3) of the Agricultural Holdings Act, 1908, and for section 16 (4) of the Act of 1923, was merely to provide that the appeal under the Agricultural Holdings Act should be to the Court of Appeal. The decision of the county court was to be final, "unless within the time and in accordance with the "conditions prescribed by the Rules of the Supreme Court either "party appeals to the Court of Appeal, from whom no appeal "shall lie."

From 1908 until 1934 it was necessary, if appeals were to lie to the Court of Appeal and not to the Divisional Court, to say so, and each of the Agricultural Holdings Acts which I have mentioned so provided. But when by the Administration of Justice (Appeals) Act, 1934, or by section 105 of the County Courts Act, 1934, which immediately followed, all appeals from the county court were to go to the Court of Appeal, there was no need to repeat that provision. I have said already that neither section 13 (3) of the Act of 1908, nor section 16 (4) of the Act of 1923 created any right of appeal. The right of appeal was given by the County Courts Act in force at the time, and it became unnecessary after the year 1934 to repeat the provisions in section 13 (3) of the Act of 1908 and section 16 (4) of the Act of 1923. But the position remains that under the County Courts Act itself a right of appeal is given from a "judgment, direction, decision or "order" on a point of law.

[His Lordship read section 77 of the Agricultural Holdings Act, 1948, providing for arbitration under the Act, and paragraph 24 of the Sixth Schedule, which provides that the arbitrator may state in the form of a special case for the opinion of the county court any question of law arising in the course of the arbitration, and continued:] In this case the arbitrator was asked to state a special case, and he did so on a question or on questions of law arising in the course of the arbitration. It is said that that is a consultative case, and that the county court judge's decision is no more than an opinion. It appears to me from what I have read that his decision would determine this arbitration finally, but it is not necessary to say so for this purpose. It is a decision on a question of law arising in the course of the arbitration. It might equally be described as a "direction." The wording of section 105 is quite different from that which led to the decision in the *Tabernacle* case.[6] In my view, the wording of section 105 of the County Courts Act, 1934, is sufficiently wide to give a right of appeal in the circumstances of the present case. If the legislature had determined to take away the right of appeal, which existed before the Act of 1948, I should have expected it to be stated in clear terms. I am satisfied that the preliminary objection fails.

Jenkins L.J. I agree, and find I cannot usefully add anything to the reasons given by my Lord for holding that the preliminary objection fails and should be dismissed.

Morris L.J. I also agree. In beginning his judgment in *In re Knight and the Tabernacle Permanent Building Society*[6] Lord Esher said[7]: "The question is whether there is any "appeal from the opinion given by the Divisional Court upon "this special case. That question depends upon an accurate "consideration of the language of the section under which the "case is stated." It seems to me that here the matter depends upon a consideration of the relevant statutory provisions contained in the Agricultural Holdings Act, 1948, and in the County Courts Act, 1934. In the Sixth Schedule to the Agricultural Holdings Act, 1948, it is provided, by paragraph 15: "The "award shall be made in such form as may be specified by "statutory instrument made by the Minister."

In 1948 the Agricultural Holdings (England and Wales) Rules, 1948 (S.I. 1948, No. 1943), were made. The first paragraph reads: "An award in an arbitration under the Agricultural Holdings "Act, 1948, shall be in the form set forth in the First Schedule "hereto, or to the like effect, with such modifications of the terms "thereof as circumstances may require." The form which is set out, Form A, shows that the award will contain paragraphs in

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[6] [1892] 2 Q.B. 613.

[7] Ibid. 617.

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reference to claims by the tenant and landlord beginning with the words " I award and determine that . . . is entitled to receive " from . . . the sum of . . . as compensation, etc." In reference to other matters the wording will be : " I determine the questions " or differences set forth in the Third Part of the Schedule hereto " in manner following (that is to say)."

Paragraph 24 of the Sixth Schedule to the Agricultural Holdings Act, 1948, provides : " The arbitrator may at any stage of the " proceedings, and shall, upon a direction in that behalf given by " the judge of the county court upon an application made by " either party, state in the form of a special case for the opinion " of the county court any question of law arising in the course of " the arbitration." Paragraph 25 reads : " (1) Where the " arbitrator has misconducted himself the county court may " remove him. (2) Where the arbitrator has misconducted him" self, or an arbitration or award has been improperly procured, " the county court may set the award aside."

Those are rather special provisions, because normally a county court judge would not be concerned with the setting aside of awards. But those provisions, following what was laid down in *In re Jones and Carter's Arbitration*,[8] will not affect the inherent jurisdiction of the High Court, though it may be that the opportunity to invoke the inherent jurisdiction of the High Court to set aside an award for error of law on the face of it may be somewhat restricted in view of the provision in the Sixth Schedule to the Agricultural Holdings Act, 1948, that an award must be in the form specified, and in view of the nature of the form of award which has been specified.

It seems to me that the ultimate question here to be decided is whether the conclusion reached by the county court judge comes within the words " judgment, direction, decision or order " as used in section 105 of the County Courts Act, 1934. That section begins with the words : " If any party to any proceedings in a " county court is dissatisfied with the determination or direction " of the judge in point of law or equity. . . ." " Proceedings " is defined to include " both actions and matters." The definition of " matter " is that it " means every proceeding in a county " court which may be commenced as prescribed otherwise than by " plaint." The definition of " prescribed " is that it " means " prescribed by the county court rules for the time being in " force " (see section 191).

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[8] [1922] 2 Ch. 599; 38 T.L.R. 779.

Reference must be made to the County Court Rules, 1936, Ord. 41, as amended in 1953. Rule 1 reads: "Proceedings in a "county court under the Agricultural Holdings Act, 1948, other "than the hearing of a special case stated by an arbitrator, shall "be commenced by originating application." Rule 3, dealing with "Special Case stated by Arbitrator," by sub-rule (1) provides: "Where an arbitrator states, in the form of a special case "for the opinion of the court, any question of law arising in the "course of the arbitration, the case shall contain a statement of "such facts and a reference to such documents as may be neces-"sary to enable the judge to decide the question of law." Sub-rule (3) provides: "The registrar shall fix a day for the "hearing and give notice thereof to the parties in Form 343." Sub-rule (6) provides: "The order of the judge shall be in Form "344 and a copy thereof shall be served on the parties to the "arbitration and on the arbitrator."

Form 344 is headed: "Order on Hearing of Special Case. "Order 42, rule 3 (6). The Agricultural Holdings Act, 1948": "The special case stated by Mr. ——, the arbitrator appointed "in the above-mentioned matter . . . coming on for hearing this "day: Now, upon reading the special case, and upon hearing "—— the judge of this court doth declare his opinion on the "question of law stated for the opinion of the court as follows." Then there is a space for the statement of his opinion, and the form concludes: "And it is ordered that a copy of this order be "sent by the registrar to the said Mr. —— "—the arbitrator—"for him to proceed in accordance with the opinion so declared "as aforesaid."

I have referred to that rule because I think that a consideration of it reinforces the view which I have formed that the ruling of the county court judge on the matter referred to him can be regarded as at least a "direction" within the words "judgment, "direction, decision or order." I think it is either a "direction" or a "decision."

We were much pressed by Mr. Albery to have in mind what was said by Lord Esher in the *Tabernacle* case,[9] and what was said in *Tata Iron and Steel Co. Ld.* v. *Bombay Chief Revenue Authority*,[10] and in particular what was said by Lord Atkinson when he delivered the opinion of the Board. But it seems to me that we have here to consider the particular statutory provisions that apply in this case, and for the reasons stated by my Lord, and for these additional reasons, I think that an appeal lies within section 105. I would add that our attention was called to the recent case of *Sclater* v. *Horton*,[11] where no point similar to that raised by Mr. Albery was taken, and where an appeal was entertained and heard by this court in a case where an arbitrator had stated a special case for the opinion of the county court and the judge had given his decision.

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[9] [1892] 2 Q.B. 613.

[10] (1923) 39 T.L.R. 288, 291.

Preliminary objection dismissed.

Their Lordships then heard further arguments by counsel for the parties on the appeal.

K. Elphinstone for the landlords. The whole agreement is not necessarily waived if a covenant is only partially not insisted upon. If there are two joint tenants it is a sufficient observance of the covenant if one of them inhabits the farmhouse. This is a covenant which runs with the land and it is binding on any person to whom it is assigned: *Tatem* v. *Chaplin.*[1] A trustee is bound to reside on the premises, being the person for the time being holding the legal estate.

M. Albery Q.C. and *D. Draycott* for the tenant trustee. If in fact the parties invited a judicial officer to go beyond his judicial function the effect would be to make it the same as an award by an arbitrator and from it there is no appeal. The judge sat in the capacity of a county court judge under the Agricultural Holdings Act and also as an arbitrator.

[SINGLETON L.J. Have you any authority where a county court judge sat in a dual capacity?]

No. The county court judge's view that the two trustees must inhabit, and there was a breach when only one trustee did so, is accepted, but it is submitted that clause 15 must have some restriction placed upon it. The covenant should not be observed where it is physically impossible for it to be performed. A bank or an insurance company may be appointed as trustee and neither could inhabit the farmhouse. [*Wyndham* v. *Jackson*,[2] *Gibbon* v. *Payne*,[3] *Gibson* v. *Doeg*[4] and *Hepworth* v. *Pickles*[5] were referred to.]

May 2. SINGLETON L.J. This is an appeal from a decision of his Honour Judge Rowe Harding, given at the Ludlow County

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[11] [1954] 2 Q.B. 1; [1954] 1 All E.R. 712.

[1] (1793) 2 Hy.Bl. 133.

[2] [1937] W.N. 291.

[3] (1906) 22 T.L.R. 54.

[4] (1857) 2 H. & N. 615.

[5] [1900] 1 Ch. 108.

Court on March 17, 1955. The case before him arose out of an arbitration under the Agricultural Holdings Act, 1948. At the request of the parties to the arbitration the arbitrator stated a case for the opinion of the county court judge. The case is in somewhat unusual form in that no facts are found. The arbitrator set out the submissions made on behalf of each party, which embraced a number of points of law. He added: "I have been requested "by the parties concerned to submit a case to this honourable "court for its decision on the preliminary points raised." In paragraph 5 he said: "I am desirous of stating for the opinion "of the court the following question: whether a person who as "trustee under a will becomes as such entitled to the interest "under the tenancy agreement of the former tenant of a holding "is bound by the clauses in the agreement relating to that "holding, and in particular is bound by clause 15 of the agreement referred to above, namely, personally to inhabit the farmhouse on the farm on the ground that such trustee is the "'tenant' within the meaning of the tenancy agreement and the "said Act."

At one stage of the argument Mr. Albery, on behalf of the tenant, argued that paragraph 5 was the only question submitted to the judge, and that the other questions with which he dealt were not before him, except by agreement, and that consequently the judge in answering them was acting as an arbitrator, and that there could be no appeal upon those questions. It appears to me to be clear that the arbitrator agreed to state for the opinion of the court the questions raised by both parties, and that he added one of his own on which he desired guidance. We ought to look upon them all in the same way. There is this further difficulty. It appears that, in the absence of any statement of facts in the case, the parties agreed certain facts. There is no document in which the agreement as to the facts is contained, though there are references in the judgment to the facts agreed.

The tenancy agreement was made on "the 13th day of "October 1893 between H. J. Allcroft of Stokesay Court . . . "(who and whose heirs and assigns are hereafter referred to as "'the landlord') of the one part and Edward Bach and Francis "Bach of Onibury" in the same county "jointly and severally "either and both of whom (who and whose executors, administrators and assigns are hereinafter referred to as 'the tenant') "of the other part." The wording of that part which I have read "is not very happy. The agreement provides: "The landlord "agrees to let and the tenant agrees to take all that dwelling-

"house, with the buildings cottages and lands and all appurtenances thereto called Lower Onibury Farm situate in the "Parish of Onibury in the County of Salop containing 345 acres "or thereabouts. . . ." By clause 6 the letting is from March 25, 1893, for one year, and afterwards from year to year until the tenancy shall be determined by either party giving to the other six calendar months' previous notice in writing to determine the same at the end of the first year or any subsequent year.

Clause 15 of the agreement reads: "The tenant will not during "this tenancy assign, let, or part with the possession of the "farm or any part thereof, but will at all times during his tenancy "personally inhabit the farmhouse on the farm and cottages with "his family and servants, and will give written notice to the "landlord of any stock agisted or taken on tack previous to the "same being placed upon the farm." It is upon this clause that the dispute arises. There is correspondence going back for some years, and the dispute arises upon the efficacy or otherwise of a notice which is said to have been given under section 24 (2) (*d*) of the Agricultural Holdings Act, 1948.

The landlords' case before the arbitrator, having set out the relevant portions of the agreement, continues in paragraph 4: "In the events which have happened the said Lloyds Bank Ld. "and Arthur Raleigh Allcroft are the estate owners in fee simple "of the said farm, and as such, the landlords of the premises." Paragraph 5 reads: "The said Edward Bach died many years "ago and the said Frank Dawes Bach died on the 2nd day of "August 1923 having by his will appointed his wife Minnie May "Bach and Harry Bach executors and trustees of his will, "which was duly proved by them in the Shrewsbury District "Registry. The said Minnie May Bach survived the said Harry "Bach and died on the 8th day of May 1950, the said George "Bernard Jones having been appointed a trustee of the will of "F. D. Bach in 1934." George Bernard Jones is one of the parties to the arbitration and is the respondent to this appeal. Paragraph 6 of the landlords' case is in these terms: "In the "events which have happened the said George Bernard Jones is, "and has been, the sole tenant of the said holding since the date "of the death of the said Minnie May Bach, but the premises "have been occupied during this period by the daughter and son-in-law of the late Minnie May Bach, namely, a Mr. and Mrs. "Norsworthy, neither of whom has experience of farming." Then paragraph 7: "It is admitted by the tenant that he has not at "any time during his tenancy personally inhabited the farmhouse "on the said farm." I need not read the next few paragraphs.

[His Lordship read paragraphs 12, 13 and 14, which respectively stated the dates of the notice to remedy the alleged breach, the notice to quit, and the tenant's counter-notice of reference to arbitration, and continued:] The tenant's case states: "1. The "tenant does not admit that he is required by clause 15 of the "said agreement dated the 25th day of March, 1893, or at all to "inhabit the farmhouse in person, and denies that he is in "breach of the said clause as alleged or at all. 2. If, which is not "admitted, the said clause does require the personal residence "of the tenant in the farmhouse, the said clause is not applicable "to a person who holds the said tenancy in a representative "capacity, namely, as trustee. The tenant denies that he is in "breach of the said clause by reason of the fact that the said "farmhouse is occupied by Dorothy Mary Norsworthy the "daughter and a beneficiary under the will of Frank Dawes "Bach deceased of which said will the tenant is trustee. 4. The "term of the agreement requiring personal residence at the "farmhouse has been waived by acceptance of trustees as tenants "and by acceptance of rent. 5. That if the tenant was still "bound by the said term, which is not admitted, that the length "of time given in the notices to the tenant was not reasonable. "6. That the tenant undertook the management of the said farm "in 1927 previous to him being appointed a trustee in 1934. "During the whole of this period the tenant has lived and is now "living at Merrivale, Brimfield. That the landlord and her pre-"decessor in title were aware of this fact and have acquiesced "thereto. 7. That if the tenant is still bound by the said term, "which is not admitted, the breach is merely technical and does "not prejudice the landlord at all. If, however, the tenant's "right to object to the notice to quit is excluded, no compensation "for disturbance will be recoverable although the said farm has "been farmed by the Bach family for over three hundred years."

It is to be observed that the surviving trustee, Jones, is described throughout this case as the tenant. Indeed, he is the person in whom the rights of the tenant under the tenancy agreement are vested; he pays the rent, and he is the person responsible for the performance of the covenants. Mr. Albery did not dispute that Jones is the tenant, but he submitted that there should be read into clause 15 the words "provided that the "tenant is legally entitled so to do," after the covenant that the tenant shall personally inhabit the farmhouse. I cannot see that it is necessary to add such a term to the agreement; nor do

I see that it would help. We do not know the facts under which, or the time at which, Mr. and Mrs. Norsworthy went into occupation. They could only do so with the consent of the tenant, Jones, and if he put it out of his power to inhabit the farmhouse, can the tenant now be heard to say that he is unable to comply with the terms of the covenant? He could have arranged to live on the premises to protect the tenancy, or he could have approached the landlords to make some arrangement agreeable to them. A short interval would not be regarded as a breach of the covenant. We do know from a letter of January 30, 1951, that it is abundantly clear that the landlords were unwilling to accept Mr. and Mrs. Norsworthy as tenants of the farm.

The county court judge dealt with the facts so far as they were agreed, and I take a passage from the file of documents before the court. The judge, dealing with the facts, said: "Edward Bach predeceased Francis Bach at some unspecified "date many years ago and Francis Bach died on August 2, 1923, "having by his will appointed his wife and Harry Bach his "executors and trustees. Harry Bach retired from the trust in "1934 and the respondent [Jones] was appointed trustee in his "stead. On May 8, 1950, Francis Bach's widow, Minnie Bach, "died, leaving the respondent sole surviving trustee, and it has "never been in dispute between the parties to this arbitration "that the legal estate in the tenancy of the holding in dispute "has been at all material times since the death of Francis Bach "in his executors and trustees for the time being, and since the "death of Minnie Bach in the present respondent. From the "date of her husband's death in 1923 until she died in 1950 it "is common ground that Minnie Bach resided on the holding, "and, although there is no express admission about this, I "imagine that Francis Bach resided on the holding until his "death, though whether Edward Bach did so until he died does "not appear."

"It was stated by Mr. Draycott, and not challenged by Mr. "Mynett, that Harry Bach did not reside on the holding while "he was trustee, and I assume that to be the fact. It is also "admitted that G. B. Jones has not resided on the holding during "any part of the time that he has been trustee, though he is a "farmer and farms a neighbouring farm. Since the death of "Minnie Bach the holding has been, and is, occupied by a Mrs. "Norsworthy, whose husband farms it with the assistance of a "bailiff. It was stated by Mr. Draycott for the respondent that "Mrs. Norsworthy was one of two beneficiaries under the will of

"Mrs. Minnie Bach, who purchased the interest of the other "beneficiary, her sister, on January 15, 1954, and that she is now "entitled to whatever beneficial interest the estate of Mrs. Minnie "Bach has in the farm, but her exact interest is not material to "any question I have to decide."

The judge continued: "Having stated the facts, I come to "the question, which is whether the respondent, as the surviving "trustee of the will of Francis Bach, is bound by clause 15 of "the tenancy agreement dated October 13, 1893, personally to "inhabit the farmhouse on the farm and cottages with his family "and servants. If he is so bound, and as he has not in fact "done so at any time, there is a breach of a term or condition "of the tenancy which entitled the landlords, if they satisfy the "other conditions of section 24 (2) (*d*) of the Act of 1948, to claim "that subsection (1) of the said section 24 does not apply, and, "accordingly, the tenancy of the respondent will expire on "March 24, 1955. The answer depends, first, on the true con"struction of the agreement and in particular of clause 15, and "secondly upon whether, assuming there has been a breach, "there has been a waiver of it. As to the first part, I have no "doubt that the trustees of the will of Francis Bach, in their "capacity as trustees, as distinct from the capacity as executors, "were bound by the clause. It is conceded by both counsel that "the condition is one that runs with the land. At one time I "had thought it a possible argument that it was one personal "to the original lessees, but in *Tatem* v. *Chaplin*[1] a clause, "almost identical in its terms with the present one, was held to "be one binding on assigns or, in other words, 'running with "'the land.' I accept Mr. Mynett's submission that, whatever "may be the position with regard to executors, 'one who takes "'the legal estate is liable on the covenants, though he takes as "'trustee or mortgagee.'"

The judge stated his conclusions, and again I take this passage from his judgment: "I think that every trustee for the time "being was at all times after the completion of the duties of "executorship bound by the clause requiring residence on the "farm. It follows that the respondent was so bound from the "time he was first appointed. It is not suggested that the land"lords were not aware of his appointment. They have accepted "rent for many years, knowing of his appointment and knowing "of his breach of the clause requiring personal residence. I

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[1] (1793) 2 H.Bl. 133.

"accept Mr. Draycott's submission that there has been waiver, "so far as the respondent's obligations under clause 15 are "concerned, from May 23, 1934, until January 31, 1951. "*Hepworth* v. *Pickles*[2] is authority for the proposition that "acquiescence for twenty years is waiver or release of a breach "of an obligation of this kind. There is no obligation upon me "to treat twenty years as a minimum period. I am quite satisfied "that the conduct of the landlords in standing by from May 23, "1934, until January 31, 1951, without protest at the respondent's non-residence on the holding constitutes waiver or release "of, or acquiescence in, the respondent's breach of clause 15, "and that the landlords are now estopped from alleging that the "respondent has committed a breach of clause 15."

The judge continued: "That would be sufficient to conclude "the matter in the respondent's favour, but Mr. Draycott submits "that there has been waiver since as far back as 1923, and if, "as has not been challenged, Harry Bach did not reside on the "holding during the time that he was trustee, he, too, was in "breach of clause 15, and it is not suggested that any protest as "to his non-residence was ever made by the landlords. Clearly, "there was in those circumstances waiver of his breach of "clause 15, but the question is whether Mr. Jones, the respondent, can pray in aid the waiver accorded to Harry Bach, and "add it to his own period of seventeen years, so as to make a "period of twenty-eight years during which a breach of clause 15 "by one of the persons entitled to the legal estate was acquiesced "in by the landlords. I think he can. He was successor in title "of Harry Bach, and I think he is entitled to say there has been "waiver of clause 15 for twenty-eight years, a time a good deal "longer than was considered necessary to establish waiver, "release or acquiescence in the case of *Hepworth* v. *Pickles*[3] "above quoted. Accordingly, I answer the question propounded "by the arbitrator by saying that, although the trustees of the "will of Francis Bach deceased were originally bound by clause 15 "of the said agreement personally to inhabit the farmhouse on "the farm, there has been a breach of such clause continuously "since 1923, first by Harry Bach, and then by the respondent, "successively trustees in whom the legal estate was vested jointly "with Minnie Bach, that there was no protest in respect of such "breaches by the landlords between 1923 and 1951, and that "whether such failure to protest is measured as from 1923 or

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[2] [1900] 1 Ch. 108.

[3] Ibid.

"from 1934, when the respondent became trustee, it is in law a "waiver or release of the said breach of the said clause 15, and "the landlords are estopped from relying upon it as a ground of "forfeiture, or as a breach by the tenant of a term or condition "of his tenancy within the meaning of section 24 (2) (*d*) of the "Agricultural Holdings Act, 1948."

This was a very troublesome case, and one to which the judge gave great care. I regret that I am unable to agree with his conclusion as to waiver or release. I am prepared to approach this point on the basis that, according to the strict terms of clause 15, both joint tenants and both trustees were required to live upon the premises, though I wish to make it clear that it is not admitted that that is the true position. There is now only one tenant, Jones, and he is not personally inhabiting the farmhouse. Until the death of Mrs. Minnie Bach in 1950 there had always been a tenant who lived on the farm. There has been no acquiescence by the landlords since 1950, as the documents show; thus it cannot be said that the landlords have acquiesced in the position as it now stands. Clause 15 is designed to prevent assignment by the tenant, and also to secure that the tenant shall live upon the farm. It cannot be supposed that the landlords would have insisted on both, or all, the trustees of a tenant living there. The purpose of the covenant that the tenant "will at all "times personally inhabit the farmhouse" was to ensure that the person responsible for the rent and for performance of the covenants should live there; in other words, to avoid having an absentee tenant, or a tenant who lived elsewhere and farmed through someone else. I do not suppose for one moment that if two trustees were tenants the landlords would have hesitated to give their permission, if it was sought, to one only living on the premises, and this was the position as long as Mrs. Bach was alive.

It is desirable to consider the circumstances of the case. Acquiescence, or failure to insist on one's rights, ought not to be held to amount to waiver of, or release from, a covenant without regard to the facts. It is not right to say on a covenant of this kind that the landlords, by reason of the fact that only one of two trustees lived on the premises, waived for all time the right to insist on the tenant, or, at least, on one of the joint tenants, personally inhabiting the farmhouse. To decide otherwise would mean, in effect, that the tenant could avoid the covenant against assignment, and could put on to the farm someone of no farming experience against the wishes of the landlords.

We were referred to certain authorities upon the question of acquiescence which might lead to waiver or release in particular cases. The first was *Gibson* v. *Doeg.*[4] I do not propose to refer to that case in detail, for it is dealt with sufficiently in the next case which I shall mention, *Hepworth* v. *Pickles*,[5] the headnote of which reads: "By a conveyance dated in 1874, a "certain plot of land was conveyed subject to a covenant that "no dwelling-house, shop, or other building to be erected on the "land should at any time thereafter be used as an inn, tavern, "or beerhouse. Shortly after the date of the conveyance beer "and spirits were sold in one of the houses erected on the land, "and continued to be openly sold for upwards of twenty-four "years:—*Held*, in an action by a purchaser to rescind a contract "for sale of that house on the ground of the existence of this "restrictive covenant, that it must be presumed from the uninter"rupted user of the premises as a beerhouse for twenty-four "years, that there had been a waiver or release of the covenant." That was a decision of Farwell J., who earlier in the same year had appeared as counsel in *In re Summerson* (1899),[6] which is reported in a footnote to the same report.

Farwell J., in his judgment, said[7]: "I find as a fact that, "very shortly after the date of that conveyance, beer, and, after "a short interval, spirits, were both sold at that shop and have "ever since been sold openly with the licence appearing in large "letters over the door for upwards of twenty-four years. That "being so, the first question I have to determine is whether the "shop is in fact now bound by the restrictive covenant. In my "opinion it is not so bound, although on its construction the "covenant is of course a continuing covenant. I think the case "is covered by the authority of *Gibson* v. *Doeg*,[8] and by the "unreported case, which I have referred to, before Romer J., of "*In re Summerson.*[9] I apprehend the law is well stated by "Pollock C.B." The judge read the passage referred to in the report of *In re Summerson*,[9] in which passage the judgment of Pollock C.B. appears, and continued: "That I take to mean "this—that if you find a long course of usage, such as in the "present case for twenty-four years, which is wholly inconsistent "with the continuance of the covenant relied upon, the court

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[4] (1857) 2 H. & N. 615.

[5] [1900] 1 Ch. 108.

[6] [1900] 1 Ch. 112n.

[7] Ibid. 110.

[8] 2 H. & N. 615.

[9] [1900] 1 Ch. 112n.

"infers some legal proceeding which has put an end to that "covenant, in order to show that the usage has been and is now "lawful, and not wrongful. This case was followed by Romer J. "in the case I have mentioned, which is in some ways a stronger "case. It was a case in which there was a sale under the order "of the court, the Corporation of Newcastle being the lessors. "There was a similar restrictive covenant. The actual lease was "anterior to the root of title fixed in the case, and there was a "very stringent covenant. In that case it was also shewn that "for thirty years the house had been carried on as a public-house. "Romer J. held, following *Gibson* v. *Doeg*,[10] that there must be "presumed to have been an actual waiver or release. I propose "to follow those authorities, and I find in this case that the "covenant has been waived or released, and that there is no "longer any doubt or question about it."

I draw attention to the words in Farwell J.'s judgment "if you find a long course of usage such as in the present case "for twenty-four years, which is wholly inconsistent with the "continuance of the covenant relied upon."

The only other authority to which I need refer is *Gibbon* v. *Payne*.[11] "The lessee of a plot of land covenanted with the "lessor to complete a coach-house and stable upon the land "within six months to the satisfaction of the lessor, and to keep "in repair the demised buildings. The lease contained a proviso "for re-entry on breach of covenant. The plot was one of a "number of building plots subject to a building scheme. The "scheme was subsequently modified, and no coach-house or "stable was ever built, the lessor approving and consenting to "the alteration. Rent was paid for the land for nearly forty "years. In an action by the assignee of the lessor to recover "possession for breach of the covenant to repair the coach-house "and stable:—*Held*, that the true inference was that the parties "intended to release the covenant to repair as regards the "coach-house and stable."

The judgment is of Lawrence J., and he is recorded as saying[12]: "I am satisfied that 3, 4, and 5 were originally laid "out so as to incorporate this strip of ground and have ever "since been so enjoyed. I think that it is not a case of the mere "non-enforcement of a covenant to repair. I am satisfied that, "in fact, this lessor approved of this alteration and licensed it, "and that both parties intended the covenant to repair to be

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[10] 2 H. & N. 615.

[11] (1906) 22 T.L.R. 54.

[12] Ibid. 55.

"released qua this stable and coach-house. I am now asked to "eject the assignee of No. 6 for not repairing a stable and coach-"house which do not exist, upon land upon which he has not "even a right to enter. I cannot do this. I think the facts "bring it well within the principle enunciated by Pollock C.B. "in '*Gibson* v. *Doeg*.'[13] I, therefore, give judgment for the "defendants Payne and Woolerton, with costs."

In the present case there is nothing in the landlords' conduct which is wholly inconsistent with the existence of the covenant; nor is there anything to show that they intended to waive performance of it. So long as *a* tenant was inhabiting the farmhouse they were satisfied. The fact that they did not take steps to compel both of two trustees to live there cannot of itself amount to complete waiver of the covenant. In a sense, it was only a partial breach which did not defeat the object of the landlords. In my judgment, there is nothing in this case which can be said to have led to the doctrine applied in the cases I have mentioned; in other words, there is not, upon the facts before this court, either waiver or release. The appeal should be allowed.

JENKINS L.J. I agree, and I will not take up time by repeating the facts upon which, largely by way of admission—for the special case stated by the arbitrator contains no findings of fact—the matter has proceeded.

As to the first question, whether, apart from waiver, Jones was bound by clause 15 of the tenancy agreement of October 13, 1893, which I will call the covenant, I think the judge came to a right conclusion upon it. The covenant is admittedly of a kind capable of running with the land (see *Tatem* v. *Chaplin*[14]), and having regard to the intelligible, though somewhat ungrammatical, definition of "the tenant" contained in the agreement it is clearly framed in a manner apt to make it run with the land. The covenant, accordingly, binds every person in whom the tenancy is for the time being vested. For example, if after Edward Bach's death Francis Bach had, with the consent of the landlords, assigned the tenancy inter vivos to a third party, such third party would have been bound by the covenant. Mr. Albery, as I understand his argument, does not dispute this, but contends that the covenant no longer applies when the tenancy has become vested in a tenant who holds as a trustee and not beneficially, at all events where he holds the tenancy in trust for a beneficiary

[13] 2 H. & N. 615.

[14] 2 H.Bl. 133.

who is absolutely entitled and cannot be compelled to allow him to inhabit personally. Mr. Albery says that in order to meet such cases the covenant must be treated as impliedly qualified, so as to require the tenant to inhabit personally "provided the "tenant is legally entitled so to do." Thus, on the present facts, Mrs. Norsworthy, now solely entitled to an absolute beneficial interest in the tenancy, cannot be compelled to allow the respondent to inhabit personally; therefore the respondent is not legally entitled to inhabit personally; therefore the covenant no longer applies.

At one stage in his argument, if I understood him correctly, Mr. Albery went so far as to say that, as a trustee cannot profit from his trust, no trustee-tenant could ever be legally entitled to inhabit personally, unless expressly authorized to do so by the terms of the trust. On that view, the covenant would cease to be applicable merely by virtue of the fact that the tenant held as a trustee and not beneficially, and was not authorized by the terms of the trust to inhabit personally. Mr. Albery says, further, that in some circumstances, and in particular circumstances arising from devolution on death, literal performance of the covenant would become impossible, and he instances the case of a testator-tenant appointing a trust corporation, which, obviously, could not inhabit personally, as executor and trustee of his will. He says that considerations such as these show that the covenant cannot have been intended to apply literally in all cases, and justify, nay, demand, the introduction of some such implied qualification as he suggests on the obligation to inhabit personally.

I cannot accept Mr. Albery's submissions. If the covenant runs with the land, it binds every person who in law for the time being answers the description of tenant, and, in my opinion, the circumstance that the tenant holds as trustee and not beneficially (a matter over which the landlords have no control) is irrelevant. I see no such impossibility in the literal application of the covenant as would justify the introduction of the implied qualification which Mr. Albery suggests. I agree that some forms of testamentary disposition by a tenant might make compliance with the covenant inconvenient, impracticable, or even impossible. But I fail to see how it can be competent to a tenant to absolve his successors from performance of the covenant by so ordering his testamentary disposition as to make it inconvenient, impracticable or impossible for them to comply with it. This would amount to alteration of the terms of the tenancy against the interest of the landlords by unilateral action on the part of the tenant.

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Jenkins L.J.

As to the position on the death of a tenant, I think that, inasmuch as it must be taken to have been within the contemplation of the parties that every tenant must die at some time, and might do so during the continuance of his tenancy, suspension of personal occupation for a reasonable time consequent on the death of the tenant would not amount to a breach of the covenant. Moreover, if the deceased tenant had by his will specifically bequeathed the tenancy to some person absolutely, the better opinion would seem to be that (as Mr. Elphinstone submitted) his executors could in due course assent to the vesting of the tenancy in that person without thereby committing a breach of the prohibition of assignment contained in the covenant. The beneficiary in such case would thus be constituted tenant and, in his turn, become bound by the covenant, and no difficulty would arise. It would therefore appear that there is no inherent impossibility, or even difficulty, in the continued application of the covenant after the death of a tenant. No doubt if a tenant chooses to bequeath the tenancy for successive interests which necessitate the vesting of it in trustees, the trustees may sooner or later be unable or unwilling to comply with the covenant, but that is no reason for holding them absolved from complying with it. I should add that I see no ground for holding that it would be as a matter of law impossible for trustees authorized to carry on the farming business of a testator, whose assets included a tenancy agreement such as this, to inhabit the premises personally if it was necessary for them to do so in order to preserve the tenancy. The question whether they should make any, and, if so, what, payment for the accommodation inhabited would be a matter for agreement with the beneficiaries or determination by the court. For these reasons I am of opinion that the judge's decision on the first question should be upheld.

As to the second question, namely, that of waiver, Mr. Albery submitted that upon its true construction the covenant required the tenant, if there was only one, and both or all the tenants if there were more than one, to inhabit the farmhouse personally. Accordingly, he said that the covenant had been consistently broken, and the landlords had consistently acquiesced in its breach, during a continuous period of some 27 years, measured from the death of Francis Bach in 1923 to the death of Mrs. Minnie Bach in 1950; for during the whole of that period only one of the two tenants, namely, Mrs. Minnie Bach, had personally inhabited the premises. On the other hand, Mr. Elphinstone submitted that upon its true construction the covenant was satisfied by personal inhabitation on the part of one only of two or more joint tenants, and, accordingly, that there had been no breach during this period.

This is, to my mind, a point of some difficulty, but one which need not for the present purpose be decided; for, assuming in Mr. Albery's favour that his construction is right, that a covenant of this kind is capable of discharge by acquiescence, and that the facts, if fully investigated, would suffice to establish acquiescence by the landlords in the state of affairs which existed from 1923 to 1950, I cannot see that the landlords' acquiescence in that state of affairs suffices to raise the inference of a release of the covenant or an estoppel precluding them from now relying upon it.

During the period in question one of the two tenant-trustees was at all times personally inhabiting the premises. The landlords' acquiescence in that state of affairs only shows that they were content to accept personal inhabitation by one of two joint tenants as a sufficient compliance with the covenant. I cannot see that it shows any more than this, or affords any sufficient ground for holding that the covenant has been totally waived or released, or that the landlords are precluded from objecting to the wholly different state of affairs which supervened in 1950, since when there has been one tenant only, in the person of the respondent, who has not at any time personally inhabited the premises. It seems to me that personal inhabitation by one only of two joint tenants on the one hand, and on the other hand failure by a single tenant to inhabit personally, so that there is no tenant inhabiting personally at all, are two materially different states of affairs; and that assent to, or acquiescence in, the latter is by no means to be inferred from assent to, or acquiescence in, the former.

Accordingly, I would allow the landlords' appeal on the second question, while holding that the judge's decision in the landlords' favour on the first question should stand.

MORRIS L.J. I agree. The judge said, in reference to the questions submitted to him, that, by inference at any rate, it was conceded that the answer to the question did not depend entirely on the construction of the tenancy agreement, but involved a consideration of the question whether, if there had been a breach of clause 15 of the agreement, there had been subsequently a waiver or acquiescence in such breach which prevented or estopped the landlords from now relying upon it for the purpose of invoking the provisions of section 24 (2) (*d*) of the Act of 1948.

The judge held, in the first place, that those who as trustees held the legal estate for the time being would, in the ordinary course, be bound by the obligation of a tenant as laid down in clause 15 of the lease. I agree with that conclusion. He further held that when Francis Bach died, leaving his interest in the holding vested in trustees, and when once they had completed their duties as executors and held merely on the trusts of the will, that then each one of them was bound by the terms of clause 15. I agree with that conclusion. Nor can I think that any qualification of the terms of clause 15 should be implied. Whether or not at the time of the negotiation of the agreement some qualification might reasonably have been agreed, I do not think that any implied term is necessary in order to give proper effectiveness to the agreement. The position was, therefore, that after Francis Bach's death both trustees should have resided. The trustees from 1923 to 1934 were Mrs. Minnie Bach and Harry Bach, and from 1934 to 1950 Mrs. Minnie Bach and George Bernard Jones. After Mrs. Minnie Bach's death, which was in May, 1950, certain communications passed, and it is certainly clear that at least from January 30, 1951, the landlords were not acquiescing in the fact of non-residence by Jones. On that date they wrote a letter, in the course of which they called upon Jones to take steps to comply with the clause in the agreement.

The judge in his judgment held that the conduct of the landlords in standing by from May 23, 1934, until January 31, 1951, without protest at the respondent's non-residence on the holding constituted waiver, or release of, or acquiescence in, the respondent's breach of clause 15, and that the landlords were now estopped from alleging that the respondent had committed a breach of clause 15. On the admitted facts I cannot see that any implication arises that the landlords agreed that they would never again insist on full performance of clause 15. It may well be that if they accepted rent with knowledge they waived breaches of covenant from time to time, but I can see no reason why they should be prevented from demanding proper compliance as from the date they required it. There may be conduct from which can be implied the waiver or abandonment of a right. I do not think that the landlords so conducted themselves that they could not assert that clause 15 should be honoured. There was no reason why after the death of Mrs. Minnie Bach they should not say that, though they had not been insisting upon the full and strict compliance with the covenant in clause 15 in the past, they proposed to require compliance for the future.

The present case differs on its facts from such cases as *Gibson* v. *Doeg*[15] and *Hepworth* v. *Pickles*.[16] It could not here be said that a judge or a jury could infer from the landlords' conduct and the admitted facts that the landlords had given some form of irrevocable licence, or some form of release, which had the effect that the covenant in clause 15 could not in the future be regarded as effective and subsisting. I agree that the appeal should, to the extent stated, be allowed.

Appeal allowed.

Solicitors: *Tamplin, Joseph & Flux for Sprott, Stokes & Turnbull, Shrewsbury; Kenneth Brown, Baker, Baker for G. H. Morgan & Sons, Ludlow.*

A. W. G.

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[15] 2 H. & N. 615.

[16] [1900] 1 Ch. 108.

ENTORES LD. *v.* MILES FAR EAST CORPORATION.

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May 3, 17.
Denning, Birkett and Parker L.JJ.

Contract—Offer and acceptance—Where contract made—Contract by telephone—Offer made by Telex communication from London—Acceptance by Telex message from Holland—Acceptance received in London—Contract made in London—Service of writ out of the jurisdiction—Subsequent variation of contract—Effect on where made—R.S.C., Ord. 11, *r.* 1 (*e*) (i).

House of Lords—Leave to appeal—Court of Appeal, by—Interlocutory matter.

Practice—Writ—Service out of jurisdiction.

The plaintiff company in London made an offer by Telex to the agents in Holland of the defendant corporation, whose headquarters were in New York, for the purchase of a quantity of copper cathodes, and their offer was duly accepted by a communication received on the plaintiffs' Telex machine in London.

The plaintiff company sought leave to serve notice of a writ on the defendant corporation in New York claiming damages for breach of the contract so made:—

Held that, although where a contract is made by post acceptance is complete as soon as the letter of acceptance is put into the post box, where a contract is made by instantaneous communication, e.g., by telephone, the contract is complete only when the acceptance is received by the offeror, since generally an acceptance must be notified to the offeror to make a binding contract; and that, since

[illegible]

contract in this case was made in London, [illegible]

it was a proper case for service [illegible]

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communications by Telex were virtually instantaneous, the contract in this case was made in London. Accordingly it was a proper case for service out of the jurisdiction under R.S.C., Ord. 11, r. 1 (*e*).[1]

Dicta of Hill J. in *Newcomb* v. *De Roos* (1859) 2 E. & E. 271 disapproved.

Decision of Donovan J. affirmed.

INTERLOCUTORY APPEAL from Donovan J.

The facts, which are stated in more detail in the judgment of Denning L.J., were as follows: The plaintiffs, Entores Ld., were an English company with a registered office in London, and the defendants, Miles Far East Corporation, were an American corporation with headquarters in New York, and with agents all over the world, including a Dutch company in Amsterdam. Both the plaintiffs and the defendants' agents in Amsterdam had in their office an equipment known as Telex Service, by which messages could be dispatched by a teleprinter operated like a typewriter in one country, and almost instantaneously received and typed in another. The plaintiffs desired to make a contract with the defendants' agents in Amsterdam for the purchase of copper cathodes from the defendant corporation. In September, 1954, a series of communications by Telex passed between the plaintiffs and the Dutch company, the material one for the present purposes being a counter-offer made by the plaintiffs on September 8, 1954, and an acceptance of that offer by the Dutch agents on behalf of the defendants received by the plaintiffs in London by Telex on September 10, 1954.

The plaintiffs later alleged that there had been a breach by the defendants of the contract. They accordingly applied for leave to serve notice of a writ on the defendants in New York on the ground that the contract was made in England and, therefore, fell within the terms of R.S.C., Ord. 11, r. 1 (*e*).

It was contended for the defendants that the contract was made in Holland.

The plaintiffs' application was granted by a master, and on appeal his decision was affirmed by Donovan J.

The defendants appealed.

Gerald Gardiner Q.C. and *S. B. R. Cooke* for the defendants. The contract in the present case was not made in London and was not therefore within the jurisdiction. The principal question raised by the appeal, on which English law is devoid of authority, is, when and at what place is a contract made when the negotiating parties are practically in instantaneous communication with each other by means of a telephone or, as in the present case, a Telex machine. So far as a contract made by correspondence is concerned, it has long been settled that the offer of a contract made by post is accepted when an acceptance is put in the post, and the contract is made at the place where that act was performed: see *Adams* v. *Lindsell*[2]; *Dunlop* v. *Higgins*[3]; *In re Imperial Land Co. of Marseilles* (*Harris's* case[4]); *British and American Telegraph Co.* v. *Colson*[5]; *Household Fire Insurance Co.* v. *Grant*.[6] In *Henthorn* v. *Fraser*[7] Lord Herschell L.C. said: "Where the circumstances are such that it must have been "within the contemplation of the parties that, according to the "ordinary usages of mankind, the post might be used as a means "of communicating the acceptance of an offer, the acceptance "is complete as soon as it is posted."

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[1] R.S.C., Ord. 11, r. 1, provides that service out of the jurisdiction of a writ of summons may be allowed (*e*) to enforce a contract (i) "made "within the jurisdiction."

So far as telegrams are concerned, the same rule has been applied: see *Henkel* v. *Pape*,[8] *Cowan* v. *O'Connor*[9] and *Bruner* v. *Moore*.[10] With regard to a contract made verbally between the parties, in *Newcomb* v. *De Roos*[11] Hill J., in considering the question of the place where the contract was made, said: "Suppose the two parties stood on different sides of the boundary "line of the district: and that the order was then verbally given "and accepted. The contract would be made in the district in "which the order was accepted."

The question of jurisdiction in relation to the place where a contract is made arises more frequently in the United States than in this country and, so far as concerns contracts made by letter or telegram, there is no difference between English and American law: see American Restatement, § 64. In the case of a contract made by telephone, it has been held in America that the contract is made at the place where the acceptance is spoken, thus applying to such a contract the same principle as that applicable in the case of a letter or telegram. In the present case acceptance by Telex was clearly within the contemplation of the parties, and if the offeree in Holland did everything in accepting the offer which the offeror in London expected him to do, which was clearly the case, a contract was made in Holland and was made at the time when the acceptance was typed on the Telex machine. That being so, the contract was not made "within the jurisdiction" within the meaning of Ord. 11, r. 1, and service of the writ in New York should not have been ordered. If the law in relation to a contract made by telephone or Telex is different from that which applies in the case of one made by letter or telegram it is desirable that it should so be laid down in clear and precise terms. [*The Hagen* [12] was also referred to.]

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[2] (1818) 1 B. & Ald. 681.

[3] (1848) 1 H.L.C. 381.

[4] (1872) L.R. 7 Ch. 587.

[5] (1871) L.R. 6 Exch. 108.

[6] (1879) 4 Ex.D. 216.

[7] [1892] 2 Ch. 27, 32; 8 T.L.R. 459.

[8] (1870) L.R. 6 Exch. 7.

[9] (1888) 20 Q.B.D. 640.

[10] [1904] 1 Ch. 305; 20 T.L.R. 125.

[11] (1859) 2 E. & E. 271, 275.

Maurice Lyell Q.C. and *Dennis Lloyd* for the plaintiffs. The contract in this case was made within the jurisdiction, and consequently service out of the jurisdiction could properly be allowed under Ord. 11, r. 1. When a contract is negotiated by telephone, Telex or other form of instantaneous communication, the contract is not complete until the acceptance is actually received by the offeror, and further, the contract is made at the place where that acceptance is received and not at the place where it is spoken or, in the case of Telex, typed. If, therefore, the offeree begins to tap out an acceptance to an offer made by Telex and the message never gets through, there is no contract. The authorities on contracts made through the post office by letter or telegram, on which reliance is placed for the defendants, have no bearing on the present case.

When a new method of communication, such as a telephone or a Telex, is employed in the making of a contract, one must beware of treating the rule in regard to postal communications as being sacrosanct, since that rule was only arrived at after long consideration of what was most convenient in regard to postal services. In the American Restatement, Contracts, § 65, it is stated that "Acceptance by telephone is governed by the prin-"ciples applicable to oral acceptance when the parties are in the "presence of each other," and it has been held in America that the contract is made at the place where the acceptor speaks his acceptance into the telephone. It is submitted that that view should not be adopted in this country either in the case of a contract by telephone or Telex, and that the contract is only complete when the offeror has received the acceptance. Further, the contract is also made at the place where the acceptance is received, in the present case in London. That view has received the support of Professor Winfield in this country: see (1939) 55 Law Quarterly Review, p. 514, "Some Aspects of Offer and "Acceptance," and of Professor Williston in America: see Contracts, § 82, p. 239.

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[12] [1908] P. 189.

Donovan J. was right in holding that the contract was made in London when the acceptance by Telex of their offer was received by the plaintiffs, and consequently an order for the service of a writ out of the jurisdiction could properly be made.

Gerald Gardiner Q.C. replied.

Cur. adv. vult.

May 17. The following judgments were read.

DENNING L.J. This is an application for leave to serve notice of a writ out of the jurisdiction. The grounds are that the action is brought to recover damages for breach of a contract made within the jurisdiction or by implication to be governed by English law.

The plaintiffs are an English company. The defendants are an American corporation with agents all over the world, including a Dutch company in Amsterdam. The plaintiffs say that the contract was made by Telex between the Dutch company in Amsterdam and the English company in London. Communications by Telex are comparatively new. Each company has a teleprinter machine in its office; and each has a Telex number like a telephone number. When one company wishes to send a message to the other, it gets the Post Office to connect up the machines. Then a clerk at one end taps the message on to his machine just as if it were a typewriter, and it is instantaneously passed to the machine at the other end, which automatically types the message onto paper at that end.

The relevant Telex messages in this case were as follows: September 8, 1954: Dutch company: "Offer for account our "associates Miles Far East Corporation Tokyo up to 400 tons "Japanese cathodes sterling 240 longton c.i.f. shipment Mitsui "Line September 28 or October 10 payment by letter of credit. "Your reply Telex Amsterdam 12174 or phone 31490 before "4 p.m. invited." English company: "Accept 100 longtons "cathodes Japanese shipment latest October 10 sterling £239 10s. "longton c.i.f. London/Rotterdam payment letter of credit stop "please confirm latest tomorrow." Dutch company: "We "received O.K. Thank you." September 9, 1954: English company: "Regarding our telephone conversation a few minutes

"ago we note that there is a query on the acceptance of our bid "for 100 tons payment in sterling and you are ascertaining that "your Tokyo office will confirm the price to be longton we there-"fore await to hear from you further." September 10, 1954: English company: "Is the price for the sterling cathodes under-"stood to be for longton by Japan as you were going to find this "out yesterday?" Dutch company: "Yes, price £239 10s. for "longton."

At that step there was a completed contract by which the defendants agreed to supply 100 tons of cathodes at a price of £239 10s. a ton. The offer was sent by Telex from England offering to pay £239 10s. a ton for 100 tons, and accepted by Telex from Holland. The question for our determination is where was the contract made?

When a contract is made by post it is clear law throughout the common law countries that the acceptance is complete as soon as the letter is put into the post box, and that is the place where the contract is made. But there is no clear rule about contracts made by telephone or by Telex. Communications by these means are virtually instantaneous and stand on a different footing.

The problem can only be solved by going in stages. Let me first consider a case where two people make a contract by word of mouth in the presence of one another. Suppose, for instance, that I shout an offer to a man across a river or a courtyard but I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance so that I can hear what he says. Not until I have his answer am I bound. I do not agree with the observations of Hill J. in *Newcomb* v. *De Roos.*[1]

Now take a case where two people make a contract by telephone. Suppose, for instance, that I make an offer to a man by telephone and, in the middle of his reply, the line goes "dead" so that I do not hear his words of acceptance. There is no contract at that moment. The other man may not know the precise moment when the line failed. But he will know that the telephone conversation was abruptly broken off: because people usually say something to signify the end of the conversation. If he wishes to make a contract, he must therefore get through again so as to make sure that I heard. Suppose next, that the line does not go dead, but it is nevertheless so indistinct that I do not catch what he says and I ask him to repeat it. He then repeats it and I hear his acceptance. The contract is made, not on the first time when I do not hear, but only the second time when I do hear. If he does not repeat it, there is no contract. The contract is only complete when I have his answer accepting the offer.

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[1] (1859) 2 E. & E. 271.

Lastly, take the Telex. Suppose a clerk in a London office taps out on the teleprinter an offer which is immediately recorded on a teleprinter in a Manchester office, and a clerk at that end taps out an acceptance. If the line goes dead in the middle of the sentence of acceptance, the teleprinter motor will stop. There is then obviously no contract. The clerk at Manchester must get through again and send his complete sentence. But it may happen that the line does not go dead, yet the message does not get through to London. Thus the clerk at Manchester may tap out his message of acceptance and it will not be recorded in London because the ink at the London end fails, or something of that kind. In that case, the Manchester clerk will not know of the failure but the London clerk will know of it and will immediately send back a message "not receiving." Then, when the fault is rectified, the Manchester clerk will repeat his message. Only then is there a contract. If he does not repeat it, there is no contract. It is not until his message is received that the contract is complete.

In all the instances I have taken so far, the man who sends the message of acceptance knows that it has not been received or he has reason to know it. So he must repeat it. But, suppose that he does not know that his message did not get home. He thinks it has. This may happen if the listener on the telephone does not catch the words of acceptance, but nevertheless does not trouble to ask for them to be repeated: or the ink on the teleprinter fails at the receiving end, but the clerk does not ask for the message to be repeated: so that the man who sends an acceptance reasonably believes that his message has been received. The offeror in such circumstances is clearly bound, because he will be estopped from saying that he did not receive the message of acceptance. It is his own fault that he did not get it. But if there should be a case where the offeror without any fault on his part does not receive the message of acceptance—yet the sender of it reasonably believes it has got home when it has not—then I think there is no contract.

My conclusion is, that the rule about instantaneous communications between the parties is different from the rule about the

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post. The contract is only complete when the acceptance is received by the offeror: and the contract is made at the place where the acceptance is received.

In a matter of this kind, however, it is very important that the countries of the world should have the same rule. I find that most of the European countries have substantially the same rule as that I have stated. Indeed, they apply it to contracts by post as well as instantaneous communications. But in the United States of America it appears as if instantaneous communications are treated in the same way as postal communications. In view of this divergence, I think that we must consider the matter on principle: and so considered, I have come to the view I have stated, and I am glad to see that Professor Winfield in this country (55 Law Quarterly Review, 514), and Professor Williston in the United States of America (Contracts, § 82, p. 239), take the same view.

Applying the principles which I have stated, I think that the contract in this case was made in London where the acceptance was received. It was, therefore, a proper case for service out of the jurisdiction.

Apart from the contract by Telex, the plaintiffs put the case in another way. They say that the contract by Telex was varied by letter posted in Holland and accepted by conduct in England: and that this amounted to a new contract made in England. The Dutch company on September 11, 1954, wrote a letter to the English company saying: "We confirm having sold to you for "account of our associates in Tokyo: 100 metric tons electro-"litic copper in cathodes: £239 10s. for longton c.i.f. U.K./ "Continental main ports: prompt shipment from a Japanese port "after receipt of export licence: payment by irrevocable and "transferable letter of credit to be opened in favour of Miles Far "East Corporation with a first class Tokyo Bank. The respec-"tive import licences to be sent directly without delay to Miles "Far East Corporation." The variations consisted in the ports of delivery, the provisions of import licence and so forth. The English company say that they accepted the variations by dispatching from London the import licence, and giving instructions in London for the opening of the letter of credit, and that this was an acceptance by conduct which was complete as soon as the acts were done in London.

I am not sure that this argument about variations is correct. It may well be that the contract is made at the place where first completed; not at the place where the variations are agreed.

But whether this be so or not, I think the variations were accepted by conduct in London and were therefore made in England. Both the original contract and ensuing variations were made in England and leave can properly be given for service out of the jurisdiction.

I am inclined to think also that the contract is by implication to be governed by English law, because England is the place with which it has the closest connexion.

I think that the decisions of the master and the judge were right, and I would dismiss the appeal.

BIRKETT L.J. I can state very briefly my agreement with the judgment just delivered by my Lord. [His Lordship stated the facts and continued:] The plaintiffs contend that the contract was made in England and, therefore, comes within Ord. 11, r. 1 of the Rules of the Supreme Court, whereby the court or a judge may allow service of a writ outside the jurisdiction where the action is one brought against a defendant for damages for breach of a contract made within the jurisdiction. The defendants say that the contract was not made in England but was made in Holland.

I am of opinion that in the case of Telex communications (which do not differ in principle from the cases where the parties negotiating a contract were actually in the presence of each other) there can be no binding contract until the offeror receives notice of the acceptance from the offeree.

Mr. Gardiner submitted that the proper principle to be applied to a case like the present could be thus stated: "If A makes an "offer to B, there is a concluded contract when B has done "all that he can do to communicate his acceptance by approved "methods." He further submitted that great difficulties would arise if Telex communications were treated differently from acceptances by post or telegram. In my opinion, the cases governing the making of contracts by letters passing through the post have no application to the making of contracts by Telex communications. The ordinary rule of law, to which the special considerations governing contracts by post are exceptions, is that the acceptance of an offer must be communicated to the offeror, and the place where the contract is made is the place where the offeror receives the notification of the acceptance by the offeree.

If a Telex instrument in Amsterdam is used to send to London the notification of the acceptance of an offer the contract is complete when the Telex instrument in London receives the notification of the acceptance (usually at the same moment that the message is being printed in Amsterdam), and the acceptance is then notified to the offeror, and the contract is made in London.

I agree with the judgment of Donovan J. and this appeal should be dismissed.

PARKER L.J. I have come to the same conclusion, and would only add a few words on the basis that the contract sued on is that created by the Telex messages. As was said by Lindley L.J. in *Carlill* v. *Carbolic Smoke Ball Co.*[2]: "Unquestionably, as a general proposition, when an offer is made, it is "necessary in order to make a binding contract, not only that it "should be accepted, but that the acceptance should be notified." In the same case Bowen L.J. said[3]: "One cannot doubt that, as "an ordinary rule of law, an acceptance of an offer made ought "to be notified to the person who makes the offer, in order that "the two minds may come together. Unless this is done the two "minds may be apart, and there is not that consensus which is "necessary according to English law—I say nothing about the "laws of other countries—to make a contract." Accordingly, as a general rule, a binding contract is made at the place where the offeror receives notification of the acceptance, that is where the offeror is.

Since, however, the requirement as to actual notification of the acceptance is for the benefit of the offeror, he may waive it and agree to the substitution for that requirement of some other conduct by the acceptor. He may do so expressly, as in the advertisement cases, by intimating that he is content with the performance of a condition. Again, he may do so impliedly by indicating a contemplated method of acceptance, for example, by post or telegram. In such a case he does not expressly dispense with actual notification, but he is held to have done so impliedly on grounds of expediency. Thus, in *Adams* v. *Lindsell*,[4] the court pointed out that unless this were so "no contract could "ever be completed by the post. For if the defendants were not "bound by their offer when accepted by the plaintiffs till the "answer was received, then the plaintiffs ought not to be bound "till after they had received the notification that the defendants "had received their answer and assented to it. And so it might "go on ad infinitum." Again, in *Dunlop* v. *Higgins*,[5] Lord

[2] [1893] 1 Q.B. 256, 262; 9 T.L.R. 124.

[3] [1893] 1 Q.B. 256, 269.

[4] (1818) 1 B. & Ald. 681, 683.

[5] (1848) 1 H.L.C. 381, 400.

Cottenham L.C. pointed out that "Common sense tells us that "transactions cannot go on without such a rule"; and in *In re Imperial Land Co. of Marseilles* (*Harris's* case[6]), Mellish L.J. referred to the mischievous consequences which would follow in commerce if no such rule was adopted. To the same effect is the judgment of Thesiger L.J. in *Household Fire Insurance Co.* v. *Grant*,[7] in which he points out that where the parties are at a distance the balance of convenience dictates that the contract shall be deemed complete when the acceptance is handed to the Post Office.

Where, however, the parties are in each other's presence or, though separated in space, communication between them is, in effect, instantaneous, there is no need for any such rule of convenience. To hold otherwise would leave no room for the operation of the general rule that notification of the acceptance must be received. An acceptor could say: "I spoke the words "of acceptance in your presence, albeit softly, and it matters "not that you did not hear me"; or, "I telephoned to you and "accepted and it matters not that the telephone went dead and "you did not get my message." Though in both these cases the acceptor was using the contemplated or, indeed, the expressly indicated mode of communication, there is no room for any implication that the offeror waived actual notification of the acceptance. It follows that I cannot agree with the observations of Hill J. in *Newcomb* v. *De Roos*.[8]

So far as Telex messages are concerned, though the dispatch and receipt of a message is not completely instantaneous, the parties are to all intents and purposes in each other's presence just as if they were in telephonic communication, and I can see no reason for departing from the general rule that there is no binding contract until notice of the acceptance is received by the offeror. That being so, and since the offer—a counter-offer—was made by the plaintiffs in London, and notification of the acceptance was received by them in London, the contract resulting therefrom was made in London. I would accordingly dismiss the appeal.

Cooke. Would your Lordships give me leave to take the matter further? It is a matter of some considerable importance. It appears that communications of this kind are on the increase, and your Lordships have at any rate disposed of a certain amount

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[6] (1872) L.R. 7 Ch. 587, 594.

[7] (1879) 4 Ex.D. 216.

[8] 2 E. & E. 271.

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of authority. I think your Lordships have also indicated that the courts here may depart from the rule which the American courts have observed with regard to the telephone.

DENNING L.J. This is an interlocutory appeal. It means that the trial of the action will be still further held up.

Cooke. We do not wish to hold up the trial of the action further than necessary. On the other hand, it is an American corporation trading all over the world. It is a matter of considerable importance to them and others in like position as to what their position really is.

DENNING L.J. On the whole we do not think that we ourselves should give leave to appeal.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Allen & Overy; Smiles & Co.*

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W. ROUGHT LD. *v.* WEST SUFFOLK COUNTY COUNCIL.

Compulsory Purchase—Compensation—Loss of profits—Income tax not deductible from compensation—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 2, *r.* (6).

The West Suffolk County Council made a compulsory purchase order, which was duly confirmed by the Minister, for the acquisition of the greater part of certain leasehold factory premises owned and occupied by the applicant company for the purpose of their business of hatters' furriers. The council took possession of the premises in October, 1952, and it was not until midsummer, 1953, that the company secured alternative accommodation for its business. For eight or nine months the company was unable to carry on its business and it claimed compensation, inter alia, for loss of profit in respect of specific orders during the interruption of its manufacturing operations. The Lands Tribunal awarded to the company £11,600 under this head. No allowance was made in respect of the company's liability to income tax on profits:—

Held, (1) that an acquiring authority on a compulsory purchase of land had to pay by way of compensation such a sum as would put the landowner, so far as money could do it, in the same position as if his land had not been taken from him; and that the measure of compensation was the same as the measure of damages applicable to the case of a breach of contract or in tort (where there were no punitive damages); (2) that, notwithstanding the proposition that compensation was part of the price which the council had to pay for the land, the tax liability of the company (if any) in respect of trading profits or gains was a question between the company and the Crown, and, so far as the council was concerned, the question of income tax was res inter alios acta; and, accordingly, that the council was not entitled to have any deduction made in respect of income tax from the compensation awarded for loss of profits.

Billingham v. *Hughes* [1949] 1 K.B. 643; 65 T.L.R. 246; [1949] 1 All E.R. 684 applied.

Horn v. *Sunderland Corporation* [1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480 considered.

Appeal from the Lands Tribunal by case stated.

This was a claim for compensation following upon the compulsory acquisition of premises forming part of a factory known as "The Maltings" situate at Brandon in the county of Suffolk.

The property, situated on the north bank of the Little Ouse river adjoining the bridge leading into the town of Brandon, was acquired by the West Suffolk County Council under a compulsory purchase order made by the council on January 3, 1951, and confirmed by the Minister of Transport on June 9, 1951. W. Rought Ld., the claimant company, was the leaseholder of the property, where it carried on the business of hatters' furriers, which consisted of the preparation of rabbit fur which formed the raw material of fur felt used for the manufacture of hats. The premises were used by the company for the storage of rabbit skins and contained the machinery for carrying on the blowing operations, which were a necessary process in the preparation of certain furs.

The council required the premises for the widening of Brandon High Street in connexion with the reconstruction of the bridge. A notice to treat was served on the company on August 25, 1951. On October 6, 1952, the council entered on the premises and started demolition works. The company could not find alternative accommodation for the business it had carried on in the premises until midsummer, 1953, and its manufacturing operations were interrupted for about nine months. The company claimed compensation for the compulsory purchase under five heads. The appeal was only concerned with part of the claim under head three for disturbance, being "a claim in respect of the loss of

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"profit in respect of specific orders by reason of the temporary "interruption of manufacturing operations." The details of this part of the claim were formulated in the case stated by Mr. Cecil H. Bailey sitting as the tribunal, as follows:

"The claimants have lost contracts for reasons directly caused "by the forced removal from Brandon. The estimated extent "of such loss is revealed by correspondence, the details of the "claim being:—

"*Joseph Wilson & Sons Ld., Denton, Manchester*	
"Loss of order for 25,000 lbs. blown coney "No. 1.	
"Estimated loss: 25,000 x 5s. 6d. ...	£6,875
"*Cia. Prada Industria e Commercio, Sao "Paulo, Brazil*	
"Loss of order for 10/20,000 kilos blown coney "No. 1	
"Estimated loss on say 10,000 kilos, say "22,000 lbs. x 6s. 1d.	£6,691
"*Chapeus Vincent Cury SA: Campinas, "Brazil*	
"Loss of order for 20,000 kilos blown BGB "unpulled	
"44,000 lbs. x 3s. 3d.	£7,150
"	£20,716"

The case stated continued: "It is not strictly correct to call "the items in this claim 'lost contracts,' they were inquiries "which did not go as far in the Brazilian cases as a discussion of "price. I decided that in the case of the Wilson inquiry the "claimants would have obtained the order and I found that in "this case they were entitled to full compensation, but I did not "accept the suggested loss of profit of 5s. 6d. a lb. On the "evidence of the accountants and an examination of the figures "in the company's accounts I decided that a loss of 4s. a lb. was "the proper amount and I therefore assessed the claimant "company's loss on this to be £5,000.

"I found that the Brazilian inquiries were by no means so "surely to be reckoned on, but I was satisfied that if the claimant "company had been undisturbed there was a very good chance "that the orders would have come their way. So I put the "66,000 lbs. claimed on these items at 2s. a lb., which gave a "figure of £6,600, making a total in these items of £11,600."

The council had contended that overpayment would result, unless income tax were taken into account when assessing the amount of compensation payable in respect of temporary loss of profits of a continuing business, since the company would not be liable for income tax on the compensation moneys for temporary disturbance.

The decision in *Billingham* v. *Hughes*[1] was cited by the company and the tribunal took the view that, if there was a liability to tax on the amount awarded as compensation or any part thereof, then that was a matter between the company and the Inland Revenue and had no relevance to the issue before it; if the Board of Inland Revenue thought that, as a result of the tribunal's decision, the company became liable to tax of some sort that was a matter for the board to take up with the company. The tribunal accordingly decided that no deduction should be made from the compensation in respect of the liability to tax.

The council appealed, and the question for the decision of the court was whether that determination was correct in law.

Geoffrey Lawrence Q.C. and *Harold Brown Q.C.* for the West Suffolk County Council. In assessing the compensation payable in respect of the disturbance of the company's business the Lands Tribunal should have taken into account the incidence of taxation which the company would have had to pay in respect of its profits for the period in question. Income tax is an incident of profits and, unless it is taken into account, the company will be getting as compensation more than its net profits after paying tax. If this were a claim in tort, it is admitted that, having regard to the decision of the Court of Appeal in *Billingham* v. *Hughes*,[1] income tax should not be taken into account in assessing compensation. That decision does not govern this case. There is no affinity between a claim for disturbance and a claim in tort. The figure of £11,600 awarded for loss of profits should have reflected a discount for income tax, not necessarily at the standard rate. The tribunal thought that it was precluded from doing so by the decision of the Court of Appeal and its figure is calculated on profits over nine months without any deduction for tax liability. It is clear that the sum awarded for temporary loss of trade will not be subject to tax in the company's hands.

The appellant council's argument is based on the following propositions. (1) This is not a claim for damages in trespass or

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[1] [1949] 1 K.B. 643; 65 T.L.R. 246; [1949] 1 All E.R. 684.

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any other tort. It is a claim for compensation in respect of a legal act done under parliamentary powers in the public interest, and the principles of the common law relating to damages for tort are not applicable in assessing compensation on a compulsory purchase. (2) The statutes which provide for compensation on a compulsory purchase recognize as the only fit subject for compensation: (i) the interest of the claimant in the land actually taken, and (ii) compensation for severance or injurious affection in respect of land not taken. Any claim for disturbance must today, as it always has been, be regarded as arising out of the value of the land. Before the passing of the Acquisition of Land (Assessment of Compensation) Act, 1919, the claim under the first head would have taken into account the value of the land to the owner. The result of judicial decisions was that matters of a speculative nature were taken into account. Claims to compensation today must arise out of the land itself and are not analogous to claims in damage for trespass or dispossession. Compensation for disturbance is awarded as part of the global value of the land and stamp duty is payable on the total sum awarded. Since the Act of 1919 the basis of the award has been altered: it is no longer the value of the land to the owner, but is now the value of the land in the open market as between a willing seller and a willing buyer. That basis of assessment would have defeated claims for disturbance and any special value of the land to the owner, and to meet that difficulty rule 6 of section 2 of the Act of 1919 gives a right to claim for disturbance. (3) It is a fundamental principle that a claimant against public funds must not be paid more than he has lost by having his lands taken from him. (4) Unless, therefore, in awarding a capital sum as consideration for the sale, the incidence of taxation is reflected in that sum, the claimant gets something in excess of what he has lost by the compulsory acquisition and something in excess of the capital value of the land. It is not contended that tax should be deducted at any particular rate.

There is nothing in *In re Lucas and Chesterfield Gas and Water Board*[2] or *Horn* v. *Sunderland Corporation*[3] which supports the suggestion that in the case of a compulsory purchase there is any analogy with tort. [Reference was also made to *Ricket* v. *Directors of the Metropolitan Railway Co.*[4]] The court can, notwithstanding the decision in *Billingham* v. *Hughes*,[5] hold that income tax must be taken into account in assessing the compensation on this compulsory acquisition. The question is: what is the measure of compensation authorized by the Act of 1919? Income tax must be taken into account if the basis of valuation is the loss of profit. All the council is seeking is to prevent the company being paid a sum in excess of its actual loss.

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[2] [1909] 1 K.B. 16; 24 T.L.R. 858.

[3] [1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480.

[4] (1867) L.R. 2 H.L. 175.

[5] [1949] 1 K.B. 643.

Harold Brown following. The test to be applied in determining the compensation payable to the company in respect of the loss of the opportunity to make profits during the nine months before fresh business premises became available is what is the net sum which the company would have had left if its business had continued for the nine months.

Derek Walker-Smith Q.C. and *M. L. M. Chavasse* for the company. It is conceded that the council's appeal can only succeed if it can show that there is no analogy between the compensation payable on the compulsory acquisition of land and damages for tort. The company contends that the analogy is complete in every material way. Since the decision in *Ricket's* case [6] compensation has been paid for disturbance, and the Act of 1919 has not changed the law in this respect: see *per* Scott L.J. in *Horn* v. *Sunderland Corporation.*[7] There are three considerations which point to the conclusion that income tax should not be taken into account in assessing this compensation: (1) the payment of income tax is, so far as the acquiring council is concerned, res inter alios acta; (2) the practice for many years has been not to take income tax into consideration, and (3) if income tax were deductible, great difficulties would arise as to the proper method of computing such tax. The same principle is applicable here as is applicable in assessing damages for tort. The decision in *Inland Revenue Commissioners* v. *Glasgow and South-Western Railway Co.*[8] was in connexion with stamp duty. The result of the council's contention would be to put on the tribunal the burden of trying the issue of the company's tax liability.

[They were stopped.]

Evershed M.R. The question in this appeal is whether the appellants, the West Suffolk County Council, having acquired compulsorily certain land and property of the respondent company, W. Rought Ld. (to whom I will hereafter refer as "the "company"), and having become liable to pay to the company, inter alia, and in addition to the value of the land taken, compensation for the company's disturbance, based on deprivation of business profits which the company thereby incurred, the arbitrator in assessing compensation should have taken some account of the additional taxes, particularly income tax, which the company would or might have become liable to pay had the business profits been earned, or whether, as the arbitrator held, he was bound, as a matter of law, to disregard altogether any such liability or possible liability.

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[6] L.R. 2 H.L. 175.

[7] [1941] 2 K.B. 26, 36.

[8] (1887) 12 App.Cas. 315.

The facts are few and not in dispute. The county council was engaged, in and after the month of October, 1952, upon a scheme for widening and rebuilding a bridge over the Little Ouse river at Brandon in Suffolk. The company owned and was in possession of certain buildings in proximity to the old bridge. As a necessary part of the bridge-widening scheme the county council, in the exercise of their statutory powers, duly acquired a substantial part of the company's premises. The company at all material times has carried on business as hatters' furriers and they used the premises in question: (a) for the storage of skins and (b) for the process known as that of "blowing" fur. As a result of the acquisition by the council the company had to find other premises, which they did in, but not before, midsummer, 1953. During the period of nine months from October, 1952, to midsummer, 1953, the company was without the premises acquired by the county council and without any other premises to take their place. As a result, the company alleged that it had lost three beneficial contracts. I am not concerned with the details of those contracts or with the validity of the arbitrator's finding that the company had suffered loss, amounting (apart from any question of income tax) in all to £11,600, in regard to those contracts. It is sufficient for the purposes of my judgment to take one of the contracts as an example, a contract which (as the arbitrator found) the company would have been able to make and would have made with a firm known as Wilsons of Manchester for the supply of 25,000 lbs. of blown coney No. 1 fur, and which, after allowing for the cost and expenses incurred in connexion with it (other than tax liability), would have yielded to the company a profit of £5,000.

The argument of the county council was to this effect: (1) if the £5,000 had been earned, then, in fact, the company would have been liable to an additional amount of income tax by reason of the fact that their business profits would have been enhanced by that amount; (2) whether or no the company would have been liable to income tax in respect of that exact sum, the arbitrator should, in any case, properly have made some estimate of the tax liability (if any) which the company would have incurred as a consequence of that contract, and, having found, as a fact, what the amount would have been, he should have reduced the compensation payable by the county council accordingly; (3) otherwise the company would get more than it would have received in the way of business earnings if there had been no compulsory acquisition of the company's property. I add that, according to the argument of the county council, as things are the company will be under no liability whatever for tax in respect of the sum payable for compensation.

It is obvious that the point, as I have stated it, has, at least as a matter of first impression, some substance and reason in it. It is equally obvious that in the case where A., by reason of some breach of contract or tortious act on his part, has to pay B. by way of damages compensation for the profits or earnings which B. has in consequence lost, there is some reason and substance in the view that if A. is bound to pay the gross sum, without regard to the liability for tax, which B. would have incurred had he enjoyed the profits or earnings, B. is better off financially than he would have been if A. had not broken the contract or not committed the tortious act. But in *Billingham* v. *Hughes*,[1] a case of personal injuries through negligence, this court held that, in the case at any rate of a tortious act on the part of A., no such diminution of liability is permissible. *Billingham* v. *Hughes*[1] is binding on this court, and I shall return to it and to some consideration of its ratio decidendi. But the argument of Mr. Lawrence and Mr. Brown for the council was that the principle of that case was not, in any event, applicable to compensation payable for disturbance by an acquiring authority. Counsel pointed out, first, that the acquiring authority is acting lawfully throughout and therefore ought not to be subject to any disability which might affect a wrongdoer; and, second, that compensation for disturbance, though so described and though calculated in this case by reference to deprivation of business profits which would otherwise have been earned, is in truth no more and no less than part of the price paid for the acquisition of the land by the acquiring authority. On these grounds Mr. Lawrence and Mr. Brown have contended that the present case is distinguishable from *Billingham* v. *Hughes*[1]

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[1] [1949] 1 K.B. 643.

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and that we ought not to regard ourselves as governed by the latter.

For the second proposition stated by the counsel for the council there is ample authority. Under the old law, before the Acquisition of Land (Assessment of Compensation) Act, 1919, it was so stated and settled by the House of Lords in *Inland Revenue Commissioners* v. *Glasgow and South-Western Railway Co.*,[2] and since the Act of 1919 the position has been held to be the same by this court in *Horn* v. *Sunderland Corporation.*[3] Mr. Lawrence particularly relied on certain language in the latter case. I observe, however, first, that in *Inland Revenue Commissioners* v. *Glasgow and South-Western Railway Co.*[4] the question before the House was as to the amount of the stamp duty payable upon a transfer of the property acquired. The question in the latter case of *Horn* v. *Sunderland Corporation* [5] I take from the second paragraph of the headnote, which states: "*Held*, by the Court of Appeal (Sir Wilfrid Greene M.R. and "Scott L.J.; Goddard L.J. dissenting), that when land being "used for agricultural purposes is ripe for building and compen-"sation for its compulsory acquisition is fixed on the basis of its "value as building land, compensation for disturbance shall only "be awarded to the extent (if any) that the value of the land for "agricultural purposes together with the compensation for dis-"turbance exceeds the compensation payable on the basis of the "land being building land."

I now refer to certain passages in the judgments in that case upon which Mr. Lawrence particularly fastened. Thus, Sir Wilfrid Greene M.R. said [6]: "Apart from injurious affection, "the question which a jury under the Lands Clauses Acts and "an arbitrator under the Act of 1919 has to answer is: What is "the price which ought to be paid to the owner for the land "which is being compulsorily acquired, price and compensation "being the same thing under different names: see *Inland "Revenue Commissioners* v. *Glasgow and South-Western Rail-"way Co.*[7] It became the practice under the Lands Clauses "Acts to ask the jury to deal separately with the elements into "which the price was capable of being split, although there was "in strictness no necessity to do this, since the price to be paid "was a global sum." Counsel referred also to this passage [8] towards the end of the judgment: "It was also said by Mr. "Squibb that, if the respondent is wrong in his contention, "results will follow which the legislature cannot have intended. "As an illustration of his point, I may take the case of land "which, at the time of acquisition, has a potential value as "building land which gives it a value (say £11,000) rather higher "than would have been the case if it had been purely agricul-"tural (say £10,000). If by disturbance the owner suffers a loss "of £2,000 and nothing is to be awarded in respect of that dis-"turbance, the owner will be damnified. The reasoning which "appeals to me does not, however, lead to any such result. In "such a case the loss of disturbance would, in my judgment, be "£1,000, and the owner, if he moved to another farm costing "£10,000 and spent or lost £2,000 in the process, would be "completely indemnified by receiving £11,000 for the value of "the land and £1,000 for disturbance. If he received an "additional £1,000 for disturbance he would be receiving profit, "not compensation." I have read that second passage because it indicates forcibly what was the point to which the judgment of the Master of the Rolls was directed.

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[2] (1887) 12 App.Cas. 315.

[3] [1941] 2 K.B. 26; 57 T.L.R. 404; [1941] 1 All E.R. 480.

[4] 12 App.Cas. 315.

[5] [1941] 2 K.B. 26.

[6] Ibid. 32.

[7] 12 App.Cas. 315.

[8] [1941] 2 K.B. 26, 36.

There is this passage in the judgment of Scott L.J.[9]: "The "sums given even in some of the reported cases seem to predicate "an almost punitive measure of damages for eviction by com-"pulsion of law. In my view, there never was anything in the "Act of 1845 to warrant such indulgence to the dispossessed "owner, and I know of no decision perpetuating any such "generosity to the owner at the expense of the promoters which "would be binding on us. Nor is there anything in section 2, "rule (6), of the Act of 1919 to compel us to follow a practice in "either jury or arbitral assessments, if there was one, of giving "to the dispossessed owner an amount of compensation which "exceeds the total sum of his real loss arising from the acquisi-"tion. Such a practice would now, as before, contravene the "basic principle of compensation." Finally, he said[10]: "This "broad view is, I think, fully borne out by the detailed provisions "of the Act of 1845. That Act was a consolidation of standard "clauses usually inserted in private Acts, as appears from its "title and preamble. It possesses two leading features. The "first is that what it gives to the owner compelled to sell is "compensation—the right to be put, so far as money can do it, "in the same position as if his land had not been taken from him.

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[9] [1941] 2 K.B. 26, 41.

[10] Ibid. 42.

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"In other words, he gains the right to receive a money payment "not less than the loss imposed on him in the public interest, "but, on the other hand, no greater."

I observe and venture to emphasize that which is obvious, namely, that the passages in the judgments which I have read and the judgments themselves are directed to the question which was in issue in that case and which I have read from the headnote. The matter with which we are concerned was never before the court or in the minds of the Master of the Rolls and Scott L.J. I find it, therefore, impossible to fasten upon such phrases as seem to indicate a strict limit in the way of compensation to the "real loss" suffered by the party whose land has been acquired as justifying the view for which the council here contend in regard to tax. On the other hand, I observe and venture to read again the basis for compensation which was stated by Scott L.J.,[10] that the first leading feature of the Act is "the right to be put, so far as money can do it, in the same "position as if his land had not been taken from him." But the proposition that compensation is part of the price which the acquiring authority has to pay for or in respect of the acquisition of the land does not, in my judgment, really assist the council at all. No doubt in that respect the sum paid for compensation is different in quality from the sum paid for (say) damages for personal injury, but that difference in quality does not, in my opinion, lead necessarily or logically to the conclusion that in the former case, but not the latter, account may be had of, or allowance made for, income tax or for the liability to income tax which the payee is or may be saved. For this purpose it is not, in my judgment, legitimate or relevant for the payer to seek to give to the sum paid some label or description such as "capital" in the hands of the payee. Whether the sum paid is income or capital in the hands of the payee is a matter with which the payer is not concerned. As I have earlier said, Mr. Lawrence stated in opening the appeal that the compensation in this case in the hands of the company would not be liable to be brought into account for income tax purposes. That may or may not be so, but it is a matter with which I am not concerned. What the payer has to pay by way of compensation is, as stated by Scott L.J. in the passage I have already twice read, a sum so as to put, so far as money can do it, the owner in the same position as if his land had not been taken from him; and this,

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[10] [1941] 2 K.B. 26, 42.

I observe, is exactly the same measure as the measure of damages applied to the case of a man liable to pay compensation for breach of contract or, for that matter (where there is no question of punitive damages), in tort.

Next, it is not, in my judgment, true to say that the profits which the company was prevented from earning from the Wilson contract would have, as such, been taxable in the company's hands. The company's liability to income tax arises in respect of the profits and gains of their business during any given year of assessment. No doubt, if the Wilson profit had been earned in fact, that sum would have had to be brought into account in the appropriate year in arriving at the profits or gains (if any) for that year, but whether and to what extent income tax would have been made leviable by reason or in consequence of the Wilson contract would have depended on a number of considerations relating to the whole business activities carried on by the company—so long, indeed, as it continued to carry them on; and it is not, in my judgment, a sufficient answer to say: "That is merely a matter of estimation, in the light of all the "known facts, or of administrative difficulty, no greater than the "administrative difficulties with which a court or a jury is often "faced in fixing a sum for damages." Apart from the extended scope of the inquiry, which acceptance of the proposition would necessarily demand, the question of the tax liability of the company in respect of its trading profits or gains (if any) is a question between the company and the Crown, with which the county council is not concerned. So far as the county council is concerned, these tax matters are, in my judgment, res inter alios actae; and this, in my view, was the true ratio of *Billingham* v. *Hughes*,[11] which did not depend upon the fact that the defendants in that case were wrongdoers and for that reason deprived, by way of punishment for their wrongdoing or otherwise, of a right to reduce their liability. The defendants in *Billingham* v. *Hughes* [11] were liable, in the same way as the council is liable here, to compensate the other party, so far as money could do it, for the loss which the other party had suffered by reason of the acts committed or complained of.

I refer to certain passages in the judgments, first of Tucker L.J. and then of Singleton L.J., in *Billingham* v. *Hughes*.[11] Tucker L.J. said [12]: "It is contended on behalf of the defendants "that the sum ultimately arrived at should reflect the fact that

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[11] [1949] 1 K.B. 643.

[12] Ibid. 647.

"it is not subject to income tax or surtax, whereas the fees which "the plaintiff would have received would have been reduced by "the incidence of these taxes. It is, I think, significant that "although income tax rose to 5s. in the pound in the year "1916–17 and has never since gone below 4s., this point has "never been raised in any reported case in this country until "1933, when it was rejected by du Parcq J. in *Fairholme* v. "*Thomas Firth and John Brown Ld.*[13] After an interval of "thirteen years and with the introduction of P.A.Y.E., it was "again raised before Atkinson J. in *Jordan* v. *Limmer and* "*Trinidad Lake Asphalt Co. Ld.*,[14] and met a similar fate. "Neither of these cases was taken to this court, and we are "accordingly called upon to deal with the question for the first "time. *Fairholme's* case [15] was a claim for damages for wrongful "dismissal, but I can see no distinction in principle between that "case and the present. It can no doubt be said in a case of "damages for wrongful dismissal that it is difficult to see why "the party who has broken his contract should benefit from his "breach by paying less by way of damages than if he had paid "the salary due under his agreement with the plaintiff, but "considerations of this kind are irrelevant to the only question "involved in the assessment of damages, whether for breach of "contract or tort, namely: what is the sum required so far as "possible financially to effect restitutio in integrum? Where, "therefore, loss of salary or earnings is the basis of the claim "for damages, whether for breach of contract or in tort, the "same considerations must apply." Then, a little later: "On "what principle, then, can the defendants, who have rendered "the earning of these fees impossible, be heard to say that the "loss should be estimated not at the sum which the plaintiff "would have received from his patients, but at a lower figure, "based on an estimate of tax which he would have been called "upon to pay at some future date? It seems to me, apart from "authority, and apart from the practice which has prevailed for "so many years, that restitutio in integrum requires the plaintiff "to be put in the position in which he would have been vis-à-vis "his patients, that is, to receive his fees in full, and that "questions of his ultimate liability to the Inland Revenue are "matters which do not concern the defendants." He then referred to certain cases, including two Scottish cases, which I pass over for the moment, because I shall refer to them in the passage which I propose to read from Singleton L.J.'s judgment. He said [16]: "It is surprising that this question has not come up "for consideration in the Court of Appeal until now; it is of "great importance." The Lord Justice referred to the two English cases, and he then said [17]: "Some three months before "the decision of Atkinson J. the question had arisen in Scotland "in *M'Daid* v. *Trustees of the Clyde Navigation*.[18] The report "of that case was not before Atkinson J. In that case Lord "Sorn held that: 'Where loss of earnings became a factor in "'assessing an award of damages to a pursuer, if these earnings "'would have been liable to taxation that fact must be taken "'into consideration and some deduction must be made in "'respect of this liability.' There is much in the reasoning of "Lord Sorn which appeals to me. If the assessment of damages "is based on the gross loss of earnings of an injured person (and "if no portion of the sum awarded is subject to income tax) it "seems to me that the assessment is not based on the pecuniary "loss sustained; in other words, if the calculation was precisely "accurate arithmetically, a plaintiff would recover more than "his pecuniary loss. The question again came up for consideration in Scotland in the case of *Blackwood* v. *Andre*,[19] when "Lord Keith expressed a directly opposite view to that of Lord "Sorn. . . . Though the principle has always been to seek to "arrive at the pecuniary loss of the individual, the practice in "the courts of this country has consistently been not to have "regard to income tax in the assessment of damages; and to alter "the practice now would lead to great confusion, and would add "immeasurably to the difficulty of assessing damages and in the "direction to be given to a jury." The Lord Justice then considered cases where the persons injured were, having regard to the conditions of their families and so forth, so situated that the amount of tax would be very much different in the one case from the other; and he concluded [20]: "A man's income is his own "and he can do with it what he likes. Income tax is a charge "on the person, and not on property or gains; it is to be charged "in respect of all property, profits or gains (section 1 of the "Income Tax Act, 1918), and under Schedule D tax is to be "charged in respect of the gains to any person from employment "or vocation." I add, reverting to Tucker L.J.'s judgment,[21] that, after referring to Lord Sorn's case of *M'Daid*,[22] he expressed the view that the two English cases before du Parcq and Atkinson JJ. had been rightly decided.

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[13] (1933) 49 T.L.R. 470.

[14] [1946] K.B. 356; 62 T.L.R. 302; [1946] 1 All E.R. 527.

[15] 49 T.L.R. 470.

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[16] [1949] 1 K.B. 643, 650.

[17] Ibid. 652.

[18] 1946 S.C. 462.

[19] 1947 S.C. 333.

[20] [1949] 1 K.B. 643, 653.

[21] Ibid. 649.

In my judgment, there is no trace in the judgments from which I have read of the proposition that the principle upon which *Billingham* v. *Hughes*[23] was decided was dependent upon the circumstance that the defendants were wrongdoers. Indeed, such a view was expressly rejected by Tucker L.J. The ratio of the judgment was that the matter of income tax liability was res inter alios acta, so far as the defendants were concerned. "A man's income is his own," said Singleton L.J.,[24] "and he "can do with it what he likes." "Questions of (the plaintiff's) "ultimate liability to the Inland Revenue," Tucker L.J. concluded,[25] "are matters which do not concern the defendants." In the present case, as it seems to me, the council are claiming to assert and revive the proposition stated by Lord Sorn which the English Court of Appeal has expressly rejected.

It follows, therefore, that if I am wrong in the reasons which I have earlier given for sustaining the view of the arbitrator, there is, in my judgment, no valid ground for distinguishing the present case from the decision, binding in this court, of *Billingham* v. *Hughes*.[26] Put another way, if we sought to distinguish it on the grounds which counsel for the council have stated and which I have tried to summarize, we should be doing no more than creating unjustified distinctions of great refinement which would add confusion to the administration of the law.

For these reasons, I think that this appeal fails and should be dismissed.

HODSON L.J. I entirely agree with the judgment of the Master of the Rolls and cannot usefully add anything.

PARKER L.J. I also entirely agree.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Sharpe, Pritchard & Co. for Alan F. Skinner, Bury St. Edmunds; E. P. Rugg & Co.*

B. A. B.

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[22] 1946 S.C. 462.
[23] [1949] 1 K.B. 643.
[24] Ibid. 653.
[25] Ibid. 649.
[26] Ibid. 643.

PAISNER AND OTHERS v. GOODRICH.

[Plaint No. K. 2109.]

C. A.

1955
Mar. 23, 24;
April 27.

Denning, Romer and Parker L.JJ.

Landlord and Tenant—Rent restriction—Shared accommodation—"Part "of house let as a separate dwelling"—Sole use by tenant of four bedrooms—Agreement for joint use with landlord of additional bedroom—Concurrent or consecutive sharing—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (2).

Judicial Precedent — Statute — Construction — Different situation — Whether different construction permissible.

The owner of a house let to a tenant four unfurnished rooms on the first floor "together with the use in common of the back "bedroom on the first floor" on a weekly tenancy, and it was further provided that the tenant should be entitled to the use (in common with the landlord) of the bathroom and lavatories of the house. After the agreement had been signed the landlord refused to allow the tenant to use the back bedroom, locking the door. That continued for four years until the landlord's death, when the tenant on occasions had the use of the room. In an action by the landlord's successors in title for possession, the tenant pleaded the Rent Acts:—

Held (Denning L.J. dissenting), that, since the tenancy agreement provided for the sharing of a living room (the back bedroom) between the landlord and tenant, the four rooms were not "let as "a separate dwelling" within section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as interpreted by the authorities, and the landlords were entitled to possession.

Per Romer L.J. I am unwilling to hold that, although a concurrent sharing does displace the operation of the Rent Restrictions Acts, a consecutive sharing does not.

Neale v. *Del Soto* [1945] K.B. 144; 61 T.L.R. 145; [1945] 1 All E.R. 191 applied.

Cole v. *Harris* [1945] K.B. 474; 61 T.L.R. 440; [1945] 2 All E.R. 146 considered.

Per Denning L.J. When interpreting a statute, the sole function of the court is to apply the words of the statute to a given situation. Once a decision has been reached on that situation, the doctrine of precedent requires us to apply the statute in the same way in any similar situation; but not in a different situation. Whenever a new situation emerges, not governed by previous decisions, the courts must be governed by the statute and not by the words of the judges.

APPEAL from Judge Clark, sitting at Ilford County Court.

Mrs. Ethel Jaffe was the owner of 4, Mansfield Road, Ilford, on the first floor of which were six rooms. Mrs. Jaffe had her own bedroom there and a spare bedroom for visitors, and there were four other rooms, one of them being fitted up as a kitchen. She arranged to let the four rooms unfurnished to the tenant, Mrs. Beatrice Goodrich, a widow with a son and daughter. The son was doing his National Service and Mrs. Jaffe agreed to allow him to sleep in the spare bedroom when he came home on leave. The tenant moved in on October 31, 1949, and on February 1, 1950, a tenancy agreement was signed whereby Mrs. Jaffe let to the tenant "all those the four rooms now in the occupation of "the tenant on the first floor . . . together with the use in "common of the back bedroom on the first floor" on a weekly tenancy at a rent of £1 5s. a week, and it was further provided that the tenant should be entitled "to the use (in common with "the landlord and all others authorized by the landlord) of the "bathroom and lavatories in the said house." After the agreement was signed, Mrs. Jaffe refused to allow the tenant to use the back bedroom. She kept it locked, and when the tenant's son came on leave he had to sleep in the morning room. On May 8, 1954, Mrs. Jaffe died, and the tenant's son on occasions used the back bedroom. On December 3, 1954, the plaintiffs, in whom the reversion expectant on the tenancy was vested, gave notice to the tenant to quit and now claimed possession of the rooms on the ground that the tenant was not entitled to the protection of the Rent Acts since the case was one of "sharing" accommodation within the meaning of *Neale* v. *Del Soto*.[1] The county court judge upheld this contention and made an order for possession.

The tenant appealed.

Peter Benenson for the tenant. The county court judge was wrong in holding that the letting was a sharing of the house and that the tenant was therefore deprived of the protection of the Rent Acts by the principle of *Neale* v. *Del Soto*.[1] The case was one of the letting of separate premises with the right to use the first floor back bedroom. That right to use was not a sharing because by necessary implication strangers do not share a bedroom but only use it consecutively. For the four-and-a-half years during which the tenant and the landlord lived in the same house the door of the bedroom was kept locked by the landlord and the room was never shared. Even if, on the true construction of the agreement, there was a sharing of the bedroom, it was not the sort of sharing that deprived the tenant of the protection of the Rent Acts. In *Neale* v. *Del Soto*[1] there had been a sharing of a garage, kitchen, bathroom, lavatory, coal-house and conservatory. It is now settled law that the sharing of a kitchen or even a kitchenette destroys the protection. But it has also been settled that the sharing of a lavatory or bathroom leaves the protection intact.

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[1] [1945] K.B. 144; 61 T.L.R. 145; [1945] 1 All E.R. 191.

It has been suggested that the distinction to be drawn is between the sharing of rooms which are living rooms and rooms which are not. But a kitchenette, too small for living in, has been held to fall within *Neale* v. *Del Soto.*[2] A better test is whether the shared accommodation consists of an essential living room. Applying that test in the present case, the bedroom was not essential to the tenant for the reasons that it was only a spare bedroom, and that the tenant had managed for four-and-a-half years without it. But even the test of whether a room is essential is not a satisfactory one. The best test is whether the shared accommodation is used simultaneously or consecutively: see *per* Mackinnon L.J. in *Cole* v. *Harris.*[3] By that test the sharing of kitchens falls within the principle involving exclusion from protection, because they are or can be used contemporaneously; lavatories and bathrooms fall outside it, and so do bedrooms—because strangers necessarily use them consecutively. In the case of consecutive user, at any one time the tenant or the landlord has the exclusive occupation and, therefore, at no time is there a sharing. A further reason why in cases of consecutive use the protection of the Rent Acts remains, is that the tenant has not a right to use that is capable of enforcement by injunction. The court will not interfere where it cannot enforce, and it cannot enforce that the landlord shall only use the bath or lavatory at such and such a time or turn him out when he is in the spare bedroom so that the tenant can enter. [Reference was also made to *Sutton* v. *Begley*[4]; *Sharpe* v. *Nichols*[5]; *Llewellyn* v. *Hinson*[6]; *Baker* v. *Turner*[7]; *Winters* v. *Dance*[8]; *Hayward* v. *Marshall,*[9] and *Lockwood* v. *Lowe.*[10]]

George Avgherinos for the landlords. The county court judge was right in holding that the arrangement in the present case constituted a sharing agreement and not the letting of a part of a house as a separate dwelling. He applied the proper test in considering the question and his decision was then one of fact and should not be disturbed. As to the facts, it is not conceded that the proper description of the room in question is that of a spare bedroom, at any rate from the point of view of the tenant. The evidence showed that the tenant intended the room to be used as a bedroom for her son, not merely when he came home on leave during his military service but also when that service had come to an end. The room was not normally used by Mrs. Jaffe except for occasional guests, and the fact that during her lifetime she prevented the tenant from using the room did not affect the tenant's right to use it or alter the character of the letting: see *Kenyon* v. *Walker.*[11] At the material time, i.e., when the action was brought, the tenant was in fact exercising her right over the room, which was being regularly used by her son.

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[2] [1945] K.B. 144.

[3] [1945] K.B. 474; 61 T.L.R. 440; [1945] 2 All E.R. 146.

[4] [1923] 2 K.B. 694.

[5] [1945] K.B. 382.

[6] [1948] 2 K.B. 385; 64 T.L.R. 321; [1948] 2 All E.R. 95.

[7] [1950] A.C. 401; 66 T.L.R. (Pt. 1) 780; [1950] 1 All E.R. 834.

[8] (1948) 64 T.L.R. 609; [1948] W.N. 317; [1949] L.J.R. 165.

[9] [1952] 2 Q.B. 89; [1952] 1 T.L.R. 779; [1952] 1 All E.R. 663.

[10] [1954] 2 Q.B. 267; [1954] 1 All E.R. 472.

The test of the room being "essential" to the tenant laid down in *Cole* v. *Harris*[12] has been approved and applied in subsequent cases. Though nearly all the reported cases deal with the sharing of a kitchen, the question is whether the shared accommodation includes a living or dwelling room, and the phrase "essential living room" which has sometimes been used merely means that the room in question is a part of the essential make-up of the house. The test is purely objective, and the needs of the particular tenant, which may vary from time to time, are irrelevant. A bedroom is clearly an essential living or dwelling room in the sense in which that word is used in the cases. It is significant that the word "essential" is not used by Morton L.J. in *Cole* v. *Harris*,[12] nor by Asquith L.J. in his judgment in *Llewellyn* v. *Hinson.*[13] There is nothing in the decided cases to support the proposition that notwithstanding that the agreement may provide for the sharing of some living accommodation the tenant is protected if the accommodation which is not shared by itself constitutes a separate dwelling.

A living room may be shared although it is intended to be used consecutively and not concurrently. In *Cole* v. *Harris*[14] Morton L.J. held that there was a sharing of a bathroom and lavatory—which necessarily would only be used consecutively—but that such a sharing was not one which would take the case out of the Rent Acts, because the rooms in question were not living rooms. The dictum of Mackinnon L.J. in the same case [15] is inconsistent with the reasoning of Morton L.J., and no such distinction between consecutive and concurrent use has been suggested in any other case. Moreover, in the present case there is nothing in the agreement which limits the user of the bedroom by the parties concerned to consecutive user. The county court judge rightly held that the principle of *Neale* v. *Del Soto* [16] applied and that the landlords were entitled to an order for possession.

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[11] [1946] 2 All E.R. 595.

[12] [1945] K.B. 474.

[13] [1950] A.C. 401.

[14] [1945] K.B. 474.

Cur. adv. vult.

April 27. The following judgments were read.

DENNING L.J. stated the facts and continued: The strange thing about this doctrine of "sharing" is that no one ever thought of it for the first 30 years of the Rent Acts. I remember being engaged in many cases after the first war when a tenant of rooms in a house shared accommodation with the landlord, but no one suggested that on that account the tenant was not protected by the Acts. *Sutton* v. *Begley* [1] is typical of the approach of the profession at that time. I cannot help thinking that that approach was more in keeping with the intention of Parliament than the recent "sharing" cases. It was the housing shortage which caused Parliament to intervene to protect tenants by the Rent Acts. It is a cruel irony that the sharing of accommodation, which was forced upon people by the housing shortage, was held by the courts to be a reason for evicting a tenant and exposing him to an extortionate rent.

Neale v. *Del Soto*,[2] which introduced the doctrine of "sharing," is based entirely on the words of the statute "let as a "separate dwelling." In that case there was a sharing of extensive accommodation, including the kitchen, and in fact the parties shared their meals in the kitchen and divided between them the work of preparing the meals. It could not be said that any part of the house was "let as a separate dwelling." The real substance of the matter was that there was a sharing of the house. There was much good sense behind the decision itself. No matter how acute the housing shortage, it was not right to force two housewives to share the same kitchen when they could not get on with one another. One or other would have to go; and of the two, the tenant, of course, had to go.

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[15] [1945] K.B. 474, 478.
[16] [1945] K.B. 474.
[1] [1923] 2 K.B. 694.
[2] [1945] K.B. 144.

By contrast, in *Cole* v. *Harris*[3] the landlord let to a tenant three rooms together with the use in common of a bathroom and a w.c. It was held that the three rooms were "let as a separate "dwelling" and did not cease to be so merely because the tenant shared the bathroom and w.c. with others. The court saw that if the doctrine of "sharing" were carried to such a length it would deprive innumerable tenants of the protection which Parliament intended them to have.

Those are the two leading cases: and the contest ever since has been whether the sharing falls on the *Neale* v. *Del Soto*[2] side of the line or on the *Cole* v. *Harris*[3] side. The cases are numerous and I need not refer to them except to say that many of the judges have suggested that it all depends on whether the shared accommodation is a living room or not. I accept that as a useful test, but I do not think that it should be regarded as decisive. If it were accepted as decisive it would mean that we have no longer to look at the words of the statute "let as a "separate dwelling" but to the words of the judges "sharing a "living room." I do not think that that is a legitimate procedure. It is a misuse of the doctrine of precedent. When the judges of this court give a decision on the interpretation of an Act of Parliament, the decision itself is binding on them and their successors (see *Cull* v. *Inland Revenue Commissioners*,[4] *Morelle Ld.* v. *Wakeling*[5]), but the words which the judges use in giving the decision are not binding. This is often a very fine distinction, because the decision can only be expressed in words. Nevertheless, it is a real distinction which will best be appreciated by remembering that, when interpreting a statute, the sole function of the court is to apply the words of the statute to a given situation. Once a decision has been reached on that situation, the doctrine of precedent requires us to apply the statute in the same way in any similar situation; but not in a different situation. Whenever a new situation emerges, not governed by previous decisions, the courts must be governed by the statute and not by the words of the judges. As Lord Porter has pointed out, "each "case must be brought back to the test of the statutory words" (see his address to the Holdsworth Law Club on Case Law in the Interpretation of Statutes, page 18). If a point should be reached where the words of the judges lead to a different result from the words of the statute, then the statute must prevail: because the judges have no right to supplant the words of the statute and would not wish to do so.

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[2] [1945] K.B. 144.

[3] [1945] K.B. 474; 61 T.L.R. 440; 1945] 2 All E.R. 146.

[4] [1940] A.C. 51; 55 T.L.R. 1049; [1939] 3 All E.R. 761.

[5] [1955] 2 W.L.R. 672; [1955] 1 All E.R. 708.

So, in the present case, I accept that the decisions of this court bind us to hold that the sharing of a kitchen or kitchenette takes away the protection of the Act, whereas the sharing of a bathroom or w.c. does not; but there is no decision as yet about the sharing of a spare bedroom. It is a new situation which was not envisaged by the judges when they laid down the test of the "living room." We must get back to the statute itself and ask ourselves whether in this case a part of the house was "let as a "separate dwelling." If it was, then the tenant is protected by the Acts, and she does not lose that protection because she shares some other part with the landlord. There can be no doubt about the answer. The four rooms on the first floor were "let as a "separate dwelling"; and the parties by their conduct showed that they were so let. For four-and-a-half years the tenant lived in those four rooms as a separate dwelling, without any use of the back bedroom at all. Mrs. Jaffe kept it locked against her. I ask myself this question: Suppose that Mrs. Jaffe, a few months before her death, had sought to evict the tenant on the ground of "sharing"? No court would have listened to her for a moment. And why, I ask, should they do more for her successors in title? The truth is that this room has never been shared at all. During Mrs. Jaffe's lifetime she alone had the use of it. Since her death Mrs. Goodrich's son has used it. Applying the simple words of the statute, I have no doubt that in this case the four rooms on the first floor were "let as a separate "dwelling" and that the tenant is protected by the Acts in regard to them: and that she does not lose the benefit of the Acts simply because she also had a right to share the spare bedroom, the bathroom and the w.c. in common with the landlord. I would allow the appeal.

ROMER L.J. I have had the advantage of reading and considering the judgment which Parker L.J. has prepared and I find myself so fully in agreement both with the conclusions at which he has arrived and with the reasons upon which those conclusions are based that I can deal with certain aspects of this case quite shortly. Subject only to the question whether the sharing between landlord and tenant of the back bedroom in question was intended to be a concurrent or a consecutive user of the room, and the effect on the position if the user was intended to be consecutive, it appears to me that the state of affairs shown to exist in the present case is precisely within the "gist" of the *Neale* v. *Del Soto*[6] line of decisions as explained by Asquith L.J. when delivering the judgment of this court in *Llewellyn* v. *Hinson*,[7] and within the statement as to the effect of those decisions expressed by Lord Porter in *Baker* v. *Turner*.[8] It was sought on behalf of the tenant to escape from or distinguish those statements of the law (which are, of course, binding upon us) on the ground that the bedroom was only placed at the partial disposal of the tenant as a spare bedroom and that for that reason, coupled with the alleged fact that the room was not "essential" to her, there was no "sharing" within the *Neale* v. *Del Soto*[9] doctrine. As to this, however, the room was not described in the tenancy agreement as a "spare bedroom," and the evidence shows that the tenant wanted the use of it for her son when he should be home on leave and even more so when he should have finished his military service and could go and live with her. So far as this point is concerned, therefore, I cannot distinguish this particular bedroom from any other bedroom which a landlord agrees to share with his tenant. Then, as to "essential" (a qualification which appears to have arisen somewhat fortuitously in relation to living accommodation in some of the more recent cases), I am unable to appreciate anything of significance, so far as the present case is concerned, that emerges from the addition of this word. The word excludes, I suppose, accommodation that is unimportant, but I imagine that all living accommodation in the usually accepted sense is of importance to a tenant, not least a room which the tenant desires for sleeping purposes for himself or a guest. It was suggested that the fact that Mrs. Jaffe, in the years which preceded her death, prevented the tenant from using this particular room shows that the tenant did not really need the room. I cannot accept this, for there are plenty of things which a person needs but which he has to do without; and many people prefer to be deprived of legal rights rather than issue a writ to enforce them.

There remains, however, the question of concurrent user. The tenant's submission as to this is (1) that it is a matter of necessary inference that Mrs. Jaffe and the tenant could not have intended that the common use of this bedroom should be enjoyed concurrently, and (2) that, accordingly, the principle of

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[6] [1945] K.B. 144.

[7] [1948] 2 K.B. 385; 64 T.L.R. 321; [1948] 2 All E.R. 95.

[8] [1950] A.C. 401, 414; 66 T.L.R. (Pt. 1) 780; [1950] 1 All E.R. 834.

[9] [1945] K.B. 144.

Neale v. *Del Soto*[10] does not apply, because only concurrent sharing falls within it. It may be conceded that inasmuch as Mrs. Jaffe and the tenant were comparative strangers, and that in any case the room might, and probably would, be used by their respective guests, they in all probability contemplated that their respective rights of user should not be exercised simultaneously. I am not, however, prepared to hold that this element of itself ousts the *Neale* v. *Del Soto*[10] doctrine. The supposition that the question of whether an intended sharing of accommodation is concurrent or consecutive is a relevant element in considering whether or not the doctrine applies appears to have first occurred to Mackinnon L.J. in *Cole* v. *Harris*.[11] I am, however, unable to find that this question has in any later case been regarded as relevant or, indeed, that it has been in any way considered in subsequent cases. It is clear that Morton L.J. thought that consecutive user might constitute a "sharing," for he more than once referred in his judgment in *Cole* v. *Harris*[11] to the sharing of a bathroom or a w.c. and only excluded such sharing from the *Neale* v. *Del Soto*[12] principle on the ground that bathrooms and lavatories do not constitute "living rooms"; and Lawrence L.J., in his judgment in the same case, obviously saw no difficulty in the conception of "sharing" a w.c. or bathroom. Many a gloss has been put by judicial interpretation upon the language of the Rent Restriction Acts, and I am unwilling to add to their number by holding that although a concurrent sharing does displace their operation a consecutive sharing does not. In my opinion, accordingly, the submission of the tenant on this point cannot be accepted.

A further point taken by Mr. Benenson for the tenant was that the right of user granted to the tenant under the tenancy agreement was of so uncertain a character that the court would not grant an injunction to prevent the lessor from attempting to interfere with the enjoyment of it; and that a right which is so indefinite as to be incapable of this protection cannot properly be regarded as amounting to a "sharing." I think it is true that there would be considerable difficulty in framing such an injunction as I have mentioned because the tenant cannot postulate that she is entitled to use the bedroom at any given time or on any particular day. Even assuming, however, that the remedy of injunction would not be open to the tenant if she was unreasonably prevented by her landlord from using the room at a time when she wanted it and the landlord did not, her right under the agreement is not one which, in my opinion, is of so vague a nature that the law would disregard it altogether; and if the court was satisfied that the tenant had been unreasonably and unwarrantably deprived of the use of the room I see no reason why she should not be awarded such damages for breach of contract as she could prove that she had sustained. Moreover, it does not seem to me that there is any essential distinction, in point of uncertainty, between the tenant's right to use the bedroom and the right to the common use of a kitchen.

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[10] [1945] K.B. 144.
[11] [1945] K.B. 474, 478.
[12] [1945] K.B. 144.

I have therefore, though with regret, arrived at the conclusion that this appeal must be dismissed. I say " with regret " because I feel that were we able to approach this case unfettered by authority my strong inclination would be to hold that the four rooms which were let to the tenant constituted a separate dwelling for the purpose of the Acts; and it seems to be a curious result that although the tenant's right to share the bathroom and lavatories in the house (and she could scarcely get on without it) does not deprive her of the protection of the Acts the less important right to use the bedroom does. However, such, in my judgment, is the effect as authoritatively expounded of the *Neale* v. *Del Soto* [13] series of decisions (unfortunate though it be), and I cannot for myself see a legitimate means of escape.

Parker L.J. (read by Romer L.J.). The question to be determined is whether a part of a house was let to the tenant as a separate dwelling. There is no doubt that the four rooms on the first floor let to the tenant constituted in themselves a separate dwelling, but by the tenancy agreement she also obtained " the use in common with the landlord of the back bedroom on " the first floor." Prior to 1945 no one suggested that in such circumstances the right to use a room in common with the landlord affected the position. Beginning, however, in 1945 with *Neale* v. *Del Soto*,[14] there have been a number of decisions of this court which show that the effect may be to constitute the sharing of the house rather than the letting of a separate dwelling. In *Llewellyn* v. *Hinson*,[15] Asquith L.J., in giving the judgment of the court, said [16]: " This court cannot consider whether *Neale* " v. *Del Soto* [17] and its satellite cases were properly decided. It

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[13] [1945] K.B. 144.
[14] Ibid.
[15] [1948] 2 K.B. 385.
[16] Ibid. 391.
[17] [1945] K.B. 144.

"can only inquire what they in fact decided. About this there "can in our view be little doubt. The gist of those decisions is "that where what the landlord under the agreement of tenancy "parts with to the tenant consists of two things: (a) exclusive "possession of a room or rooms, plus (b) user, jointly with "someone else, of another room or other rooms which come "under the description of a living room or living rooms, then the "tenant cannot say that he is the tenant of a 'house let as a "'separate dwelling or part of a house being a part so let.' The "ratio decidendi is that the 'dwelling' of the tenant on the facts "assumed consists of the totality constituted by (a) plus (b): and "that part of the totality is not 'separately' let to him, because "the possession or user of it is to be shared by him with "another: a state of affairs which is inconsistent with the word "'separately,' and indeed with the word 'let' for both of these "terms connote exclusive possession or enjoyment." This statement of the effect of the cases was quoted with approval by Lord Normand and Lord MacDermott in *Baker* v. *Turner*,[18] and Lord Porter said[19]: "The main results of decisions may, I think, be "tabulated as follows: (1) A portion of a house which is let by "a landlord to a tenant, even if in itself separate, ceases to be "a separate dwelling or to be protected by the Acts if the terms "of the letting contain a provision that the tenant shall have "the right of using a living room belonging to the landlord:" It is true that the appellant in that case accepted the decision in *Neale* v. *Del Soto*[20] and the cases which followed it as correct, but so far at any rate as this court is concerned, the principles to be deduced from the cases as enunciated by Asquith L.J. and Lord Porter are binding upon us. It is accordingly, in my view, much too late to contend that the true test is whether the premises let, for example, the four rooms in the present case, constitute a separate dwelling. As Asquith L.J. pointed out in *Llewellyn* v. *Hinson*,[21] vide supra, the ratio decidendi of the decision in *Neale* v. *Del Soto*[20] and its satellite cases necessitated a limitation which would exclude cases where the joint user was of some ancillary accommodation or facility such as a w.c., a bathroom, a boxroom or a coal cellar. Thus the operation of the rule has been limited to cases in which the joint user of a "living room" has been given, for example, a kitchen (*Neale* v. *Del Soto*[20] and *Kenyon* v. *Walker*[22]) and a kitchenette

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[18] [1950] A.C. 401.

[19] Ibid. 414.

[20] [1945] K.B. 144.

[21] [1948] 2 K.B. 385.

[22] 62 T.L.R. 702; [1946] 2 All E.R. 595.

(*Winters* v. *Dance*[23]), as opposed to the joint user of some ancillary accommodation or facility, for example, a w.c. and bathroom (*Cole* v. *Harris*[24]) or a right to draw water in the kitchen (*Hayward* v. *Marshall*[25]). No doubt as a means of drawing this distinction the word "essential" has crept in in connexion with the living room. Thus the headnote in *Cole* v. *Harris*[26] stated that "if there was a sharing of essential living "room" there would not be a letting of a separate dwelling-house; though Mackinnon L.J. said[27] that these words form part of Morton L.J.'s test in the same case, a reference to Morton L.J.'s judgment discloses no use of the word "essential" when he is stating what he says is the true test. Morton L.J., in the same case, said[28]: "It cannot be that any sharing of any "room, however unimportant, takes the property outside the "operation of the Act." Thereafter the word "essential" has several times been used. Thus in *Winters* v. *Dance*[29] Tucker L.J. says: "I think that the basis of the decisions is that a "room which is used for the primary purpose of cooking is a "living-room: it is essential to the life of the occupants of the "premises and is a room in which, of necessity, at least one "occupant of the premises spends an appreciable portion of his "or her life." Again, in *Hayward* v. *Marshall*,[30] Jenkins L.J. sets out the question in this form: "Is that room" (the use of which is shared) "part of the essential living accommodation?" It is to be observed, however, that the word does not appear in Asquith L.J.'s review of the cases in *Llewellyn* v. *Hinson*[31] or in any of their Lordships' speeches in *Baker* v. *Turner*.[32]

In my opinion the use of the word "essential" is in contradistinction to "unimportant." Moreover, the test is purely objective. Is it part of the essential make-up of the house? (cf. Evershed M.R. in *Hayward* v. *Marshall*,[33] where he said: "The "distinction rests rather upon the view that the ordinary uses "and purposes of a kitchen are essential manifestations of living "or residence"). The question is not whether the room is essential for the particular tenant. Viewed in this light it is, I think, impossible to say that the joint user of a bedroom does not make the Acts inapplicable.

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[23] [1948] W.N. 317; 64 T.L.R. 609; [1949] L.J.R. 165.

[24] [1945] K.B. 474.

[25] [1952] 2 Q.B. 89; [1952] 1 T.L.R. 779; [1952] 1 All E.R. 663.

[26] [1945] K.B. 474.

[27] Ibid. 479.

[28] Ibid. 482.

[29] [1949] L.J.R. 165, 169.

[30] [1952] 2 Q.B. 89, 97.

[31] [1948] 2 K.B. 385.

[32] [1950] A.C. 401.

[33] [1952] 2 Q.B. 89, 99.

It is, however, suggested that in order that the Acts should not apply, the user to be shared must be a contemporaneous user and not a successive user. This conception was put forward and put forward alone by Mackinnon L.J. in *Cole* v. *Harris* [34] in contrasting the sharing of the user of a kitchen as opposed to the sharing of the use of a w.c. or a bathroom where, by their nature, the user would be successive. That was not, however, the reason for his decision because [35] he adopts Morton L.J.'s test of whether or not the room is a living room. In other words, he bases his decision, not on the nature of the sharing, but on the nature of the accommodation, and no one in any other case has sought to distinguish the nature of the sharing. Speaking for myself, I can see no difference for the purposes of the application of the rule between the ordinary sharing of the use of a kitchen with a contemporaneous user contemplated and a sharing of the use of a kitchen with an express provision for consecutive user, for example, at fixed times. The position, I conceive, might be different if the stipulation were for the exclusive use by the tenant for, say, the first three months in every year. In any event I should be loth at this late date to introduce what appears to me to be "an unwarrantable extra refinement" (cf. Morton L.J. in *Kenyon* v. *Walker* [36]). The provision, however, in the present case is for "the use in common with the landlord of the "back bedroom." There is no express stipulation for exclusive user by the tenant for any period, and, indeed, on the face of the agreement there is nothing to prevent a contemporaneous user. Accordingly, I have reluctantly come to the conclusion that the Acts do not apply and that the county court judge came to a correct decision. I say "reluctantly" because all one's sympathy is with the tenant who by Mrs. Jaffe's conduct was for a long time prevented from enjoying any use of the bedroom, and because, apart from authority, I should have had little doubt that what was let to her was a separate dwelling.

Appeal dismissed.

Solicitors: *Richardson, Sowerby, Holden & Co.; Paisner & Co.*

P. B. D.

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[34] [1945] K.B. 474, 478.
[35] Ibid. 479.
[36] [1946] 2 All E.R. 595, 598.

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June 8,
10, 22.

Denning,
Birkett and
Romer L.JJ.

INGHAM AND ANOTHER *v.* EMES.

[Plaint No. L. 27.]

Contract—Implied term—Work and materials—Implied warranty as to fitness for particular purpose—Duty of customer to disclose to contractor any relevant abnormal circumstance known to customer—Hairdresser dyeing customer's hair—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 14 (1).

Sale of Goods—Implied term—Fitness for purpose.

In a contract for work and materials, the customer who seeks to rely on the implied warranty that the materials used were reasonably fit for the particular purpose must have disclosed to the contractor the particular purpose, including any relevant abnormal or peculiar circumstance known to the customer, for which the work and materials were required.

Accordingly, when a customer, who knew that she had previously proved allergic to a particular form of hair dye, developed dermatitis as a result of having her hair dyed with that substance, and it was found that the hairdresser had, before dyeing the hair, carried out the test required by the manufacturers with skill and care, but that the customer had not disclosed to the hairdresser her particular allergy:—

Held, that, although there was an implied term in the contract which was analogous to the corresponding term in section 14 (1) of the Sale of Goods Act, 1893, that the materials used were reasonably fit for the purpose for which they were required, the hairdresser was not liable for breach of the implied warranty as to fitness. The particular purpose for which the work and materials were required was the dyeing of the hair of a person who knew herself to be allergic to the substance, and the implied warranty extended only to the dyeing of the hair of normal persons, who had successfully passed the test.

Griffiths v. *Peter Conway Ld.* [1939] 1 All E.R. 685 considered.

APPEAL from Judge Gordon Clark, sitting at Guildford county court.

In 1947, Mrs. Elsie Florence Ingham, the wife of a publican, had her hair dyed by a hairdresser with a preparation known as Inecto. After about two days her eyes became puffy, and the doctor whom she consulted suspected that the Inecto had caused the trouble.

In September, 1951, she started going to the defendant hairdressers, Maison Emes, in Godalming, where she was attended by an assistant, and for two and a half years she regularly had her hair tinted with henna by that assistant. They were on excellent terms with one another, and, as the county court judge found, Mrs. Ingham might well during those visits have told the assistant about her previous experience with Inecto, but only in a gossipy manner and not in such a way as to make any impression on the assistant's mind.

In March, 1954, Mrs. Ingham, having become tired of the henna shampoos, the assistant suggested to her that she should try Inecto, adding that if she did so she would have to have a test beforehand, as it was dangerous. On March 9, Mrs. Ingham went to have the test and the assistant opened a package of Inecto and put the instructions on the table before Mrs. Ingham, who read them. They stated: "The manufacturers draw atten-"tion to a simple and easy test which in the opinion of eminent "skin specialists will disclose any predisposition to skin trouble "from the use of the dye. The test must, as a matter of routine, "be employed on each occasion prior to using the dye, regardless "of the fact that it has been used with success on the same "person on a previous occasion." Then followed in large letters: "It may be dangerous to use Inecto Rapid without this test." The test was described, and the instructions continued: "If no "irritation has been experienced and there is no redness or "inflammation then the skin is free from predisposition and the "colouring may be used."

The assistant applied the test in exact accordance with the instructions. Two days later Mrs. Ingham returned; the assistant examined the patch and said that her skin was perfectly clear, that Mrs. Ingham was not a reactor, and that she was a safe person to have Inecto. On March 16 Mrs. Ingham had her hair dyed with Inecto, and within a few days she was suffering from acute dermatitis. There was no doubt that the dermatitis was due to the Inecto. Mrs. Ingham and her husband thereupon brought an action against the hairdresser and the assistant.

In the particulars of claim it was pleaded that the assistant, the servant of the hairdresser, had advised the female plaintiff that instead of using the henna dye with which she had been in the habit of tinting her hair, she should have her hair dyed with Inecto. It was then pleaded that Inecto was a dangerous substance, as the assistant well knew; that she knew, further, that the female plaintiff was allergic to Inecto or predisposed to skin trouble with its use; and that in the circumstances Inecto should not have been used on the female plaintiff without making a proper test as laid down by the manufacturers; that such test as was carried out was negligently and improperly done so that there was in fact no proper test at all; and that the hairdresser, through

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the assistant, was liable for negligence, or, alternatively, for breach of the implied warranty that she had properly carried out the test and that the female plaintiff could safely use Inecto. The defendants denied liability.

At the hearing before the county court judge there was a conflict between the female plaintiff and the assistant as to whether Mrs. Ingham had, on the occasion of the first visit in March, 1954, reminded the assistant of her previous experience with Inecto. The assistant said that the plaintiff had not reminded her, and added that if she had known that a customer had had an Inecto application before and had had trouble, she would not even have made a test, and would not have used that substance.

The county court judge accepted the evidence of the assistant and rejected that of the female plaintiff on this point; and on the issue of negligence, he found in favour of the hairdressers that the test had been properly carried out and that there had been no negligence on their part. On the claim for breach of the implied warranty, however, the judge, having found that the balance of proof inclined in favour of the female plaintiff being of the rare type to whom the ordinary test would not apply, but who was allergic to a large dose, and that there was no fault on either party, held that the hairdressers were liable. He said: "It is "conceded that, as in the parallel case of the sale of goods, there "is prima facie an implied warranty that the stuff supplied will "be suitable for what it has to do; a hair dye which produced "dermatitis is not suitable; it may be suitable for the vast "majority, but unfortunately it was not suitable for this par-"ticular person. What escape is there for the defendants? "While they repel the allegation of negligence, how can they get "out of the allegation that they used material which was not in "fact suitable?" He awarded the female plaintiff £60 damages. The defendants appealed.

S. H. Noakes and *Christopher Lea* for the defendants. The county court judge found that in this contract, which was for work done and materials supplied, there was an absolute warranty by the hairdresser that the materials supplied would be reasonably fit for use on this particular head, and that the customer was relying on the hairdresser's skill and judgment. He applied the implied warranty in the proviso to section 14 of the Sale of Goods

Act, 1893,[1] in its strictest form. It is submitted: (1) There is no evidence that the customer was relying on the skill and judgment of the hairdresser in the selection of the materials; and (2) the implied warranty that materials are reasonably fit for a particular purpose only arises when the purpose is made known to the supplier. Where there is, as here, a particular idiosyncrasy which was not disclosed to the supplier, the requirement which brings the warranty into play has not been satisfied. In *Griffiths* v. *Peter Conway Ld.*,[2] which was not cited in the county court, a case in which it was found that the customer who bought a Harris tweed coat was peculiarly sensitive to the material, Sir Wilfrid Greene M.R.[3] said that it was impossible to say that the seller had the particular purpose pointed out to him so as to show that the buyer relied on his skill or judgment. That covers the present case.

[DENNING L.J. Is there not a distinction in that Harris tweed is not a dangerous thing, whereas Inecto is dangerous in itself?]

That does not affect the principle that in this case, as in *Griffiths'* case,[3] the warranty is qualified. The fact that it is a dangerous substance affects only the standard of care required in its use, and the judge has found that the hairdresser was in no way negligent. Sir Wilfrid Greene M.R.[3] also pointed out that the object of stating the particular purpose to the seller was to enable him to decide whether or not he would accept the burden of the implied condition; and the assistant in the present case, Mrs. Hughes, said that if any customer had told her that she had ever had trouble with Inecto she, the assistant, would not even have given her a test. This case is stronger than *Griffiths'* case,[3] for there the customer had no knowledge of her abnormal reaction to Harris tweed, whereas the customer here knew of her allergy to Inecto.

In *G. H. Myers & Co.* v. *Brent Cross Service Co.*[4] du Parcq J., though he said that the obligation in a contract for work and

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[1] Sale of Goods Act, 1893, s. 14: "Subject to the provisions of this Act "and of any statute in that behalf, "there is no implied warranty or condition as to the quality or fitness "for any particular purpose of goods "supplied under a contract of sale, "except as follows: (1) Where the "buyer, expressly or by implication, "makes known to the seller the particular purpose for which the goods "are required, so as to show that the "buyer relies on the seller's skill or "judgment, and the goods are of a "description which it is in the course "of the seller's business to supply "(whether he be the manufacturer or "not), there is an implied condition "that the goods shall be reasonably "fit for such purpose, . . ."

[2] [1939] 1 All E.R. 685.

[3] Ibid. 692.

[4] [1934] 1 K.B. 46, 54–5.

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materials was not less than that in a contract for the sale of goods, also held that where the customer selected the source of the materials for the work the supplier would be liable only for a patent and not for a latent defect. Here the customer selected Inecto and so cannot rely on the implied warranty. In *Watson* v. *Buckley, Osborne, Garrett & Co.*[5] a hairdresser was held liable in contract to a customer because the product she used to dye his hair was dangerous in itself, requiring an exceptional standard of care, and she had impliedly warranted that it was merchantable; but it is distinguishable from the present case, for here the necessary exceptional standard of care was exercised by the assistant in carrying out the test properly before dyeing the whole head. The law was correctly applied by Sellers J. in *Stewart* v. *Reavell's Garage*,[6] where a customer first selected the source from which a particular car part should be obtained and then left it to the garage proprietor to get the part. Sellers J. held that the garage proprietor was liable because the customer had shown that he was relying on the proprietor's skill and judgment; but the judge also said that there was no logical distinction between the two kinds of contract under consideration.[7]

Roger Willis for the plaintiffs. It is submitted, first, that both on principle and on the authorities the obligation and duty on a contractor in a contract for work and materials are higher than those of the seller in a contract for the sale of goods under section 14 of the Sale of Goods Act, 1893. The contractor has the whole matter in his control and it is for him to find out whether the materials he uses are suitable for the particular purpose, and not for the customer to tell him what to use. Moreover, he himself must know the purpose for which he is doing the work. If there is something peculiar in a car taken to a garage for repair, the garage proprietor could not plead in a claim for breach of implied warranty that the materials used were first-class but that he did not know that the car had some idiosyncrasy. In *G. H. Myers & Co.* v. *Brent Cross Service Co.*[8] du Parcq J. cited a passage from the dissenting judgment of Greer L.J. (later generally approved in the House of Lords) in *Cammell Laird & Co. Ld.* v. *Manganese Bronze and Brass Co. Ld.*,[9] to the effect that the obligation in a contract for work and materials was greater than that in a contract for the sale of goods, and du Parcq J.[10]

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[5] [1940] 1 All E.R. 174.

[6] [1952] 2 Q.B. 545; [1952] 1 T.L.R. 1266; [1952] 1 All E.R. 1191.

[7] [1952] 2 Q.B. 545, 549–50.

[8] [1934] 1 K.B. 46, 54.

[9] [1933] 2 K.B. 141, 195.

[10] [1934] 1 K.B. 46, 54–5.

said that that was a true view to take, and that the obligation was certainly no less. There is no implied warranty at all on the sale of goods unless certain conditions set out in the excepting sections are fulfilled; whereas in contracts for work and materials there is always an implied condition, which is only removed where the employer of the contractor makes it perfectly clear that he does not rely on the skill or judgment of the contractor. The judgment of du Parcq J. in *Myers'* case [10] was expressly approved by Scott L.J. in *Samuels* v. *Davis*.[11] It is conceded that the decision of Sellers J. in *Stewart* v. *Reavell's Garage* [12] is contrary to the present contention, for Sellers J. said that the test was the same; but it is submitted that the test was too narrowly stated in that case.

Applying those authorities and principles to the present facts, the whole matter of dyeing this particular customer's hair was within the control of the hairdressers. The plaintiff was not under any duty to disclose the fact that she had in the past had trouble with Inecto. The hairdressers impliedly warranted that the materials they used for the work would be fit for the purpose. They were not fit, and the plaintiff is accordingly entitled to judgment.

[ROMER L.J. All that the hairdresser did here was to rub the Inecto on the customer's hair. It seems odd that legal liability should depend on a trifle such as that.]

There is no particular hardship on the defendants in such a case. They know that the material is dangerous and they can require the customer to sign a form before the dyeing process is carried out, thereby showing that she does not rely on their skill or judgment.

The effect of the implied warranty on the facts of this case is that the defendants' liability is absolute. It was never suggested that the customer was under a duty to disclose her former trouble. Silence does not matter unless it is fraudulent; and the judge has found that there was no fault in either party. It makes no difference that there was an abnormality; such abnormality only becomes important under section 14 of the Sale of Goods Act, 1893, and *Griffiths* v. *Peter Conway Ld.*,[13] in so far as it is contrary to the present submission, is distinguishable because what was there involved was only a contract for the sale of goods.

Secondly, if the obligation in both forms of contract is the

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[10] [1934] 1 K.B. 46, 54–5.

[11] [1943] K.B. 526, 528; [1943] 2 All E.R. 3.

[12] [1952] 2 Q.B. 545.

[13] [1939] 1 All E.R. 685.

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same, then it is submitted that on the facts the present case is distinguishable from *Griffiths* v. *Peter Conway Ld.*[13] The subject-matter there was Harris tweed which, so far as anyone knows, is an innocuous substance, but produced dermatitis in the customer because of her abnormal make-up. Here the substance is one which everyone knows to be dangerous, and which is known to have affected some people adversely even when they have had a successful test. The consequences must, therefore, be entirely different. The hairdresser cannot escape liability by saying, "I "carried out a test," for that puts her duty no higher than it would be if there were no contract at all but only the duty of care necessary to avoid a claim in negligence.

Thirdly, there was at the lowest an implied warranty, as the county court judge held. But it is submitted that there was also an express warranty by the hairdresser in that she said that if the test was successful this particular customer could safely have the whole head dyed. The test therefore became nothing more nor less than a trap for the customer.

[ROMER L.J. Could it not equally be said that the customer laid a trap for the hairdresser in not letting her know of her previous experience with Inecto?]

The express warranty consisted in the assurance that as soon as the test was proved successful it was safe to have the whole head dyed. In *Jones* v. *Bright*[14] Best C.J. said that it was the duty of the court to lay down rules to protect persons ignorant of the qualities of a commodity; and in *Randall* v. *Newsom*,[15] in which Sir William Brett J.A. reviewed all the authorities on the subject up to that date, there is no mention of the words as to disclosure of purpose which appear in section 14 of the Act of 1893. The customer was entitled to rely on the express warranty that the materials were safe.

Noakes in reply. If the warranty in a contract for work and materials is, as it may be, wider than in a contract for sale of goods, it is only so on the basis that the particular purpose is made known to the contractor. *Griffiths'* case[16] is not distinguishable, for after the test the Inecto became an innocent and not a dangerous substance for any normal person, and fell into the same category as the Harris tweed. As to the submission that the customer was not under a duty to disclose her allergy, that is difficult to sustain in view of her own emphasis at the hearing that she had done so.

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[13] [1939] 1 All E.R. 685.

[14] (1829) 5 Bing. 533, 546.

[15] (1877) 2 Q.B.D. 102.

[16] [1939] 1 All E.R. 685.

Cur. adv. vult.

June 22. DENNING L.J. read a judgment in which he stated the facts, and continued: It appears from the evidence that the test is not infallible. Dr. Hassan, the expert called by the defendants, described Inecto as "an extremely dangerous substance." In very rare cases, even when the test is negative, the subject herself may be sensitive to it. For instance, she may be negative when the test is done, but sensitive a few days later when the dye is applied. Or she may not react to the small test, but she may react to the full dose. The judge came to the conclusion that Mrs. Ingham was "of the rare type to whom the "ordinary test will not apply, but who is allergic to a large dose," and he found that there was "no fault on either party." He therefore dismissed the claim founded on negligence, but he found in favour of Mrs. Ingham on the ground of breach of warranty. He found that there was a warranty by the hairdresser that the Inecto was suitable for this particular person, Mrs. Ingham, and they were liable when it turned out not to be suitable.

If Mrs. Ingham had not had any previous trouble with Inecto I think that the judge would have been right. She was apparently a perfectly normal person, and the assistant said, or as good as said, to her: "If you pass the test you may safely have Inecto." There would, in those circumstances, be an implied term that Inecto was reasonably fit for the purpose of dyeing the hair of this particular person if she passed the test. But Mrs. Ingham to her own knowledge was not in this regard a perfectly normal person. She had experienced Inecto before and she knew that it might have a bad effect on her. In the modern phrase, she knew that she was allergic to it. She ought clearly to have made that known to the assistant; and she knew that she ought to have done so. That is shown by the fact that she herself insisted at the trial that she had told the assistant about it on the very day that Inecto was suggested; but, unfortunately for her, the judge did not accept her evidence on this point. If she had made it known, the assistant would never have gone on with the Inecto. It is rather like the case which I put in the course of the argument: if a doctor suggests penicillin, and the patient knows by experience that he is allergic to penicillin he ought to tell the doctor so. I appreciate that cases of medical treatment are very different from the present, but there is in each case a duty to use reasonable care to disclose known peculiarities. Mrs. Ingham ought to have brought home to the assistant that she was allergic to Inecto.

The difficulty that I have felt is that this looks like a plea of contributory negligence, or a plea that Mrs. Ingham was the author of her own misfortune; and that has never been pleaded or found. But I think the same result is reached by saying that the implied term as to fitness is dependent on proper disclosure by the customer of any relevant peculiarities known to her, and in particular of the fact that she knew by experience that Inecto might have a bad effect on her. The way this result is reached in law is this: in a contract for work and materials (such as the present) there is an implied term that the materials are reasonably fit for the purpose for which they are required: see *Myers* v. *Brent Cross Service Co.*[1] This term is analogous to the corresponding term in the sale of goods: see *Stewart* v. *Reavell's Garage.*[2] In order for the implied term to arise, however, the customer must make known to the contractor expressly or by implication the "particular purpose" for which the materials are required so as to show that he relies on the contractor's skill or judgment. The particular purpose in this case was to dye the hair, not of a normal person, but of a person known to be allergic to Inecto. Mrs. Ingham did not make that particular purpose known to the assistant. She cannot therefore recover on the implied term.

I ought perhaps to say that I do not think that this case is governed by the Harris tweed case, *Griffiths* v. *Peter Conway Ld.*,[3] in which a woman suffered from dermatitis owing to wearing a Harris tweed coat which was specially made for her, and failed to recover damages. Harris tweed is not a dangerous thing, and it is reasonably fit for any normal person, test or no test; whereas Inecto is a dangerous thing which is not reasonably fit for anyone unless there is a test. The manufacturers in their instructions represent, in effect, that if a person passes the test, Inecto is safe. The hairdresser passed on that representation to her customer on her own account. That brings an implied term into operation in favour of all persons who pass the test except those, such as Mrs. Ingham, who know that they are allergic and do not disclose it. I would therefore allow the appeal and give judgment for the defendants.

[1] [1934] 1 K.B. 46.

[2] [1952] 2 Q.B. 545; [1952] 1 T.L.R. 1266; [1952] 1 All E.R. 1191.

[3] [1939] 1 All E.R. 685.

BIRKETT L.J. In view of the arguments addressed to this court in this appeal it is both interesting and instructive to see the way the case was presented before the county court judge.

[His Lordship stated the substance of the pleadings as set out above, and continued:] The county court judge formed a very high opinion of the assistant as a witness, and he found as a fact that the main contention of Mrs. Ingham that the test had not been properly carried out could not be sustained. The test was properly carried out, and there was no negligence on the part of the assistant. Equally unsuccessful was the suggestion that the implied warranty given by the assistant that she had carried out the test properly had been broken. There was another very important question of fact. Mrs. Ingham made it part of her case in the county court that in 1947, at the premises of another hairdresser, she had had an application of Inecto and in two days had a puffiness round the eyes in consequence. She also said in evidence: "I knew Inecto might have a bad effect "on me." She was very emphatic that she had told the assistant of this experience. [His Lordship referred to passages in the evidence of Mrs. Ingham, and continued:] The assistant had been a hairdresser for 26 years, and had been giving Inecto applications for 20 years without any previous trouble. She told the judge that if she had known that a customer had had an Inecto application before and had had trouble, she would not handle the case at all; she would not even make a test. It seems to be fairly clear that the judge did not accept the version given by Mrs. Ingham. He said: "If Mrs. Ingham is to be "believed about her conversation about her previous trouble how "much worse was Mrs. Hughes' [the assistant's] conduct? She "would have said: 'Well, if I do do it, I will give you a proper "'test.' It is incredible that she should not take the trouble." It would seem to me that there is some fault in the transcription of these notes and something would appear to have been left out. But the judge also said this: "She says that Mrs. Hughes "suggested she should try Inecto; a conflict between Mrs. Hughes "and Mrs. Ingham as Mrs. Ingham says 'I've had it before, as I "'told you'; and Mrs. Hughes replied: 'You had no test then; "'you will have one now.' Mrs. Ingham says she had mentioned "her previous trouble. Mrs. Hughes denies anything of the sort. "'I should never have gone as far as a test if I had known of "'previous trouble.' In the course of gossip Mrs. Ingham may "well have mentioned Inecto plus slight trouble, but hard to "credit here that no sooner did Mrs. Hughes mention Inecto "than she reminded her—if so Mrs. Hughes would be very rash "if she continued to suggest it." The judge said of Mrs. Hughes: "She was a decidedly impressive witness; she did not give me the "impression of one who would be likely to overlook a precaution." The judge then proceeded to decide the case on the footing that a proper test had been applied by the assistant, that as a result of it she was entirely justified in telling Mrs. Ingham that she might safely have the Inecto application; and that the explanation of the whole matter was that Mrs. Ingham was that rare type to whom the ordinary test will not apply but who is nevertheless allergic to a large dose or application. The judge said: "On that finding"—that is, that there was no fault in either party—"upon whom does the responsibility lie for the misfortune "of Mrs. Ingham? This is a narrow point. It is conceded that "as in the parallel case of the sale of goods there is prima facie "an implied warranty that the stuff supplied will be suitable for "what it has to do; a hair dye which produced dermatitis is not "suitable; it may be suitable for the vast majority but unfortunately it was not suitable for this particular person—what "escape is there for the defendants? While they repel the "allegation of negligence, how can they get out of the allegation "that they used material which was not in fact suitable?"

On the evidence, there can be no doubt that Mrs. Ingham was not a normal, ordinary person so far as the effects of Inecto were concerned. It was the foundation of her case in the county court that she was not, and that she had made her disability in this connexion quite plain to the assistant. But the judge has found that this knowledge was not effectively conveyed to the assistant. Everything in the case points to the conclusion that this experienced hairdresser would have had nothing to do with a customer who was allergic to Inecto having an application of it. The circular issued by the manufacturers stressed in large type: "It may be dangerous to use Inecto Rapid without this "test," and Mrs. Ingham had also read this circular. Now what is the position in law in circumstances like these when an important fact is concealed which ought to be made known? The county court judge referred to the implied warranty which arises in certain circumstances under the Sale of Goods Act, 1893, and he asked the question: How can the defendants get out of the allegation that they used material which was not in fact suitable? For it was never contended that Mrs. Ingham had not suffered from the application of Inecto in this case. But when the judge said that "the risk of putting it on the wrong person even if no "skill or care could discover it must rest on the defendant," he overlooked the important fact that this was already known to Mrs. Ingham, and that she was under a duty to inform Mrs. Hughes of her peculiar position. That Mrs. Ingham recognized this is clear from the evidence she gave that she did in fact disclose her knowledge, although the county court judge did not accept the evidence. In my opinion the assistant did not impliedly warrant that Inecto was safe to be used by persons who were in fact allergic to it but only by those who, having passed the test, could be regarded as normal ordinary people. Mrs. Ingham was not an ordinary normal person in this sense at all, and as she knew of her peculiarity and failed to disclose it to the assistant, I think that she disables herself from relying on the implied warranty. In a limited sense she made known the purpose to Mrs. Hughes, and that purpose was to have her hair dyed. But the true purpose was to have her hair dyed as a person allergic to Inecto to her knowledge and this purpose was never disclosed to the assistant. I would allow the appeal.

ROMER L.J. I agree. In my opinion the decisive fact in this case which precludes Mrs. Ingham from succeeding is that when she had her hair dyed with Inecto in 1954 she knew, but the assistant did not know, that she had in 1947 suffered ill effects from the application of this dye. "I knew," she said in her evidence, "that Inecto might have a bad effect on me." She further said that she in fact passed this information on to the assistant at the time when this lady suggested the Inecto treatment, and her emphasis on this point shows the importance which she rightly attached to it. The judge, however, found himself unable to accept her evidence as to this, and it must be taken that she never did convey to the assistant's mind that she had had any unfortunate experience of Inecto on a previous occasion. Mr. Willis submitted for the plaintiff that her omission to communicate this experience to the assistant is an irrelevant consideration. His contention was that the defendant, through Mrs. Hughes, warranted that if the plaintiff satisfactorily passed the test which the assistant suggested (and she did so pass it) then the plaintiff could safely receive the Inecto treatment. The liability of the defendant, he submitted, under this warranty was absolute, and was unaffected by the plaintiff's failure to mention the incident which had occurred in 1947. I am quite unable to accept this submission. The assistant had no reason to suppose that Mrs. Ingham was other than normal in her reactions to Inecto and the test itself indicated her normality. Mrs. Ingham herself, however, had reason to know, and did know, that she was abnormal in this respect, but withheld this vital information from the assistant. In these circumstances it appears to me that it would be against all justice that Mrs. Ingham should recover damages against the defendant for breach of a warranty which she would never have thought of giving if she had known what Mrs. Ingham herself knew. In the Harris tweed case (*Griffiths* v. *Peter Conway Ld.*[4]) Sir Wilfrid Greene M.R. said[5]: "In this particular case, the judge has found the "existence of abnormality and, that being so, it seems to me "impossible to say that the seller here had the particular purpose "pointed out to him so as to show that the buyer relied on his "skill or judgment. After all, the object of that is to enable the "seller to make up his mind whether or not he will accept the "burden of the implied condition, and the effect of the argument "addressed to us would be to impose that implied condition upon "the seller without his having the opportunity of knowing the "vital matter which would affect his mind." Sir Wilfrid Greene M.R. was dealing there with the condition as to fitness implied by section 14 (1) of the Sale of Goods Act, 1893, but his reasoning appears to me to be applicable to the warranty on which the plaintiff relies in the present case. The "particular purpose" which the plaintiff made known was the dyeing of the hair of a person whose reaction to Inecto was normal, and it was in respect of such a person and no other that Mrs. Hughes was accepting the liability which her assurance involved. If she shared the plaintiff's own knowledge as to the 1947 incident she would not have accepted this liability, and in my judgment the plaintiff's reticence vitiates Mrs. Hughes' assurance, with the result that no liability thereunder arises.

I would prefer to express no concluded opinion as to what the position would have been if Mrs. Ingham had had no reason to suppose that Inecto was harmful to her. It might be argued that the satisfactory outcome of the test converted Inecto from a potentially dangerous material to one which is safe in relation to all but a very few abnormal people, and thus assimilated the dye to the Harris tweed in *Griffiths* v. *Peter Conway Ld.*[6] On the other hand, the true view might be that the defendant would have been held liable on the ground that Inecto is inherently dangerous and that this quality distinguishes it from Harris tweed, which is a normally safe material. Having regard to the facts of this particular case, the question does not arise for decision and I would prefer to reserve my opinion on it. I agree that the appeal should be allowed.

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[4] [1939] 1 All E.R. 685.
[5] Ibid. 692.
[6] [1939] 1 All E.R. 685.

Appeal allowed.

Solicitors: *Chamberlain & Co.; Day, Whately & Co., Godalming.*

M. M. H.

MORELLE LD. *v.* WAKELING AND ANOTHER.

[Plaint No. K. 1224.]

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Feb. 14, 15, 16;
March 3.

Evershed M.R., Denning, Jenkins, Morris and Romer L.JJ.

Mortmain — Lease — Foreign company — Transfer of registered land—Company registered as proprietors of leasehold interest in land in United Kingdom—No licence in mortmain obtained from Crown—No compliance with Companies Acts requirements for holding land —Forfeiture to Crown from date of registration of transfer—Land registration—Practice—Leasehold possessory title—Validity of registration—Effect of non-compliance with statutory forms—Discretion of registrar—Magna Carta, 1225 (9 *Hen.* 3, *c.* 36)—*Statute De Religiosis Viris,* 1279 (7 *Edw.* 1)—*Charitable Uses Act,* 1735 (9 *Geo.* 2, *c.* 36)—*Mortmain and Charitable Uses Act,* 1888 (51 *&* 52 *Vict. c.* 42), *ss.* 1 (1) (2), 10—*Mortmain and Charitable Uses Act,* 1891 (54 *&* 55 *Vict. c.* 73), *s.* 3—*Land Registration Act,* 1925 (15 *Geo.* 5, *c.* 21), *ss.* 23 (1), 80, 144 (1)—*Land Registration Rules,* 1925 (*S.R. & O.,* 1925, *No.* 1093/*L.*28), *rr.* 74, 121, 123, 322 —*Form* 35.

Judicial Precedent—Court of Appeal decision—Per incuriam—Mortmain — Inadequate argument — Interested party not represented. Statute—Construction—Consolidating Act—To be construed against background of previous law—Mortmain. Practice and Procedure —Parties—Joinder—Crown—Amicus curiae—R.S.C., Ord. 16, *r.* 11.

In *Morelle Ld.* v. *Waterworth* [1955] 1 Q.B. 1; [1954] 2 All E.R. 673 the Court of Appeal (Singleton, Denning and Morris L.JJ.) decided that a company registered in Eire, neither incorporated nor registered under the Companies Acts and having no place of business in this country, were not entitled to recover rent on premises the residue of a lease of which had been assigned to them, since, the company not having obtained a licence in mortmain, section 1 of the Mortmain and Charitable Uses Act, 1888, applied. The Crown was not before the court.

Rodnall Ld. v. *Ludbrook*, a similar case but in which the lease had been registered, was decided in the same sense at the same time on counsel's concession that it was indistinguishable.

The present case was likewise similar to *Morelle Ld.* v. *Waterworth*, save that the company was registered in H.M. Land Registry as the proprietor of a possessory title to the leasehold interest in the land in question. The registration was effected pursuant to a transfer by the previous registered proprietor of that interest. The transfer was not, however, made in the prescribed statutory form.*

It was contended that the first *Morelle* case was decided per incuriam since the subject-matter was of a specialized and highly technical character which infrequently came before the courts; the arguments were brief, counsel for the company having only been instructed the previous afternoon; there was consequently an absence of sufficient emphasis on the feudal origin of mortmain and on the fact that the Act of 1888 was a consolidating statute; and the Crown was not represented:—

Held, (1) that the decision in *Morelle Ld.* v. *Waterworth* was not given per incuriam. The general rule was that a decision should be held to have been given per incuriam only where it was given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court, so that in such cases some part of the decision or some step in the reasoning on which it was based was on that account demonstrably wrong. That was not so in *Morelle Ld.* v. *Waterworth*, and while the general rule was not necessarily exhaustive, cases not within it, which could properly be held to have been decided per incuriam, must be of the rarest occurrence. A decision was not to be treated as having been given per incuriam simply because of a deficiency of parties, or because it might be made to appear that on an earlier occasion the court had not had the benefit of the best argument.

Young v. *Bristol Aeroplane Co. Ld.* [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293 applied.

Police Authority for Huddersfield v. *Watson* [1947] K.B. 842; 63 T.L.R. 415; [1947] 2 All E.R. 193; *Garvin* v. *Police Authority for City of London* [1944] K.B. 358; 60 T.L.R. 207; [1944] 1 All E.R. 378; *Nicholas* v. *Penny* [1950] 2 K.B. 466; 66 T.L.R. (Pt. 1) 1122; sub nom. *Penny* v. *Nicholas* [1950] 2 All E.R. 89; *A. & J. Mucklow Ld.* (*in liquidation*) v. *Inland Revenue Commissioners* [1954] Ch. 615; [1954] 2 All E.R. 508 considered.

(2) That *Morelle Ld.* v. *Waterworth* was not distinguishable on the ground that that case did not concern registered land. Nothing in section 23 of the Land Registration Act, 1925, ousted the saving of the Crown's right to forfeiture preserved by section 80, and by virtue of that provision the forfeiture took immediate and automatic effect on the registration of the transfer, just as it would have done on the execution and delivery of an assignment of unregistered leaseholds. Forfeiture was not suspended pending an order for rectification of the register or contingent on such an order being

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* Form 35: see rule 121 (1) of the Land Registration Rules, 1925.

obtained. But it would have made no effective difference if the forfeiture had occurred at any step of the transaction earlier than the actual completion of the sale by registration of the plaintiff company as proprietor.

Per curiam. If *Morelle Ld.* v. *Waterworth* [1955] 1 Q.B. 1 had been distinguishable on this ground; the decision in *Rodnall Ld.* v. *Ludbrook* [1955] 1 Q.B. 1 would have been given per incuriam.

(3) That, although the transfer to the company was not in the prescribed statutory form, it was not for that reason invalidated, having regard to the wide discretion given to the registrar by rules 74 and 123 (1) of the Land Registration Rules, 1925, as to the forms to be used, and by rule 322 (1) enabling him to authorize a departure from the general rules if he was satisfied that he could properly do so. The acceptance for registration of the form actually used must be taken as conclusive of its sufficiency in point of form.

Note to Brickdale and Stewart-Wallace on the Land Registration Act, 1925 (4th ed., 1939, p. 380) disapproved.

APPEAL from Judge Wilfrid Clothier, sitting at Lambeth County Court.

On December 20, 1952, one Desmond Dixon, of 87, Eric Street, Bow, London, E.3, transferred to the plaintiff company, Morelle Ld., the residue of a term of 99 years from December 25, 1865, granted by a lease dated February 6, 1868, by the Ecclesiastical Commissioners for England relating to premises known as 158, Coldharbour Lane, London, S.E.5, part of which was at the date of the transfer let to the defendants, Frederick Wakeling and Louise Isabella Wakeling his wife, as weekly tenants at a rent of 45s. 5d. per week, inclusive of general and water rates. The land was registered in H.M. Land Registry with a leasehold possessory title, the date of first registration being July 19, 1904. The transferor, Dixon, was registered as proprietor on November 26, 1951. In the instrument of transfer to the plaintiff company the registered office of the company was stated to be 8, Upper O'Connell Street, Dublin, Eire.

The plaintiff company applied to H.M. Land Registry to have the transfer registered, and on January 27, 1953, the company was registered as the present proprietor of the leasehold possessory title in the property, the address of the company on that occasion being given as "care of Yamild Ld., 128, Albany Street, "N.W.1," and the price paid was said to be £85.

On July 9, 1954, the plaintiff company commenced proceedings against the tenants claiming arrears of rent from January 27, 1953, to July 5, 1954, less rates, totalling £105 9s. 6d. By their

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defence the defendants challenged the title of the plaintiff company to sue on the ground that, as the company had not obtained a licence from the Crown in mortmain to acquire or to hold the land, the same was forfeit by virtue of the provisions of section 1 of the Mortmain and Charitable Uses Act, 1888.[1] They further claimed, inter alia, that they were not the tenants of the plaintiff company.

At the hearing in the county court the plaintiff company contended that, notwithstanding the effect of the Mortmain Acts, registration had given to the company a good title to the land and the right to sue in respect of it, unless and until the Crown or some other person entitled to make application obtained rectification of the register. The county court judge dismissed the claim and the company appealed.

On December 9, 10, 1954, the Court of Appeal, consisting of Evershed M.R., Birkett and Romer L.JJ., adjourned the hearing of the appeal to give the Attorney-General an opportunity to attend as amicus curiae, and it came on before a full court of five judges. At the opening of the appeal, application was made under R.S.C., Ord. 16, r. 11,[2] that the Crown should be joined as a defendant, but the court postponed deciding this matter until the conclusion of the appeal, the Crown appearing as amicus curiae. At the conclusion of the appeal, and after judgment had been delivered, application was made again, but leave to join the Crown was refused.

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[1] Mortmain and Charitable Uses Act, 1888, s. 1: " (1) Land shall not " be assured to or for the benefit of, " or acquired by or on behalf of, any " corporation in mortmain, otherwise " than under the authority of a " licence from Her Majesty the " Queen, or of a statute for the time " being in force, and if any land is " so assured otherwise than as afore- " said the land shall be forfeited to " Her Majesty from the date of the " assurance, and Her Majesty may " enter on and hold the land " accordingly: (2) . . . (iv) If the " right of entry under this Act is " exercised by or on behalf of a mesne " lord, the land shall be forfeited to " that lord from the date of the assur- " ance instead of to Her Majesty."

S. 10: " . . . (iii) 'Land' includes " tenements and hereditaments cor- " poreal and incorporeal of whatsoever " tenure, and any estate and interest " in land. . . ."

[2] R.S.C., Ord. 16, r. 11: " . . . " The court . . . may, at any stage " of the proceedings, either upon or " without the application of either " party . . . order that the names " of any parties improperly joined, " whether as plaintiffs or defendants, " be struck out, and that the names " of any parties, whether plaintiffs or " defendants, who ought to have " been joined, or whose presence " before the court may be necessary " in order to enable the court effectu- " ally and completely to adjudicate " upon and settle all the questions " involved in the cause or matter, be " added: . . ."

Sir Reginald Manningham-Buller Q.C., A.-G., Geoffrey Cross Q.C. and *Denys Buckley* for Her Majesty's Treasury as amici curiae. The decision in *Morelle Ld.* v. *Waterworth* [3] that the assignment to the company was an assurance of land in mortmain and resulted in the term being automatically forfeited to the Crown does not bind the court in the present case, because, first, in this case, and not in *Morelle Ld.* v. *Waterworth*,[3] the title to the interest was registered at the Land Registry and the assurance in mortmain was a transfer of that registered interest completed by registration of the company as proprietors in succession to the transferor. Secondly, the decision in *Morelle Ld.* v. *Waterworth* [3] was given per incuriam.

There is no hard-and-fast rule for determining whether a decision has been given per incuriam, but applying the principle in *Young* v. *Bristol Aeroplane Co. Ld.*[4] in the light of the later cases of *Police Authority for Huddersfield* v. *Watson* [5]; *Nicholas* v. *Penny* [6]; *Rex* v. *Northumberland Compensation Appeal Tribunal, Ex parte Shaw*,[7] and *A. & J. Mucklow Ld.* (*in liquidation*) v. *Inland Revenue Commissioners*,[8] if the argument before the court was not the best that could have been put, so that relevant authorities, judicial or statutory, were not brought to the attention of the court, or if the argument was not fully developed, the decision may be open to question on the ground that it was given per incuriam. [Reference was also made to *Willcock* v. *Muckle*.[9]] If the matter not brought to the attention of the court was a decision which was not binding on that court, but one which might have influenced it to come to a conclusion different from that actually reached, it may be a question of degree whether the decision was given per incuriam, but that is not the present case, for here vital matters were not brought to the attention of the court.

In *Morelle Ld.* v. *Waterworth* [10] the court was being asked to deal with an unfamiliar branch of law which had fallen into disuse until that case was brought. The submissions on the question of mortmain had to be presented at short notice and were not fully developed. The judgment was not a reserved judgment. In those circumstances it is not surprising that several important points were not sufficiently stressed or were given no weight at all.

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[3] [1955] 1 Q.B. 1; [1954] 2 All E.R. 673.

[4] [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293.

[5] [1947] K.B. 842; 63 T.L.R. 415; [1947] 2 All E.R. 193.

[6] [1950] 2 K.B. 466; 66 T.L.R. (Pt. 1) 1122; sub nom. *Penny* v. *Nicholas* [1950] 2 All E.R. 89.

[7] [1951] 1 K.B. 711; [1951] 1 T.L.R. 270; [1951] 1 All E.R. 268; ([1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122, C.A.).

[8] [1954] Ch. 615; [1954] 2 All E.R. 508.

[9] [1951] 2 K.B. 844; [1951] 2 T.L.R. 373; [1951] 2 All E.R. 367.

[10] [1955] 1 Q.B. 1.

The construction of the Mortmain and Charitable Uses Act, 1888, was allowed to proceed on a wrong footing because it was not drawn to the attention of the court that that Act (as amended in 1891) was a consolidating statute, which would not, prima facie, effect a radical alteration in the law. If the language of such a statute makes a clear and unambiguous extension of the pre-existing law, effect must, of course, be given to it: *Murugiah* v. *Jainudeen*[11] and *MacConnell* v. *E. Prill & Co. Ld.*[12]; but if there is any ambiguity there is a strong presumption against a construction of such a statute which would result in amending the pre-existing law: *In re Budgett*[13] and *Aristoc Ld.* v. *Rysta Ld.*[14] That it was not the intention of the Act of 1888 to alter the pre-existing law is indicated by the title. In construing the Act of 1888, as amended in 1891, regard should have been had to the background of the law of mortmain as it previously stood—that is, with particular reference to the terms of the confirmation of Magna Carta, 9 Hen. 3, c. 36, and the Statute De Religiosis Viris, 1279, 7 Edw. 1. These statutes may have been mentioned in *Morelle Ld.* v. *Waterworth*,[15] but the significance of the feudal origin of the law of mortmain was not mentioned. It was not pointed out that those statutes were directed to the holding of land in feudal tenure and struck at dispositions of the fee. Leaseholds were not within the scope of the law of mortmain, except where the term granted was of such duration that it was practically equivalent to a freehold so that the grant was a colourable transaction masking an alienation of the fee. Under the old law, if a long lease had been granted at a nominal rent to a religious house the fee would have been liable to go back to the feudal lord, or in default to the Crown, but if on the granting of the lease a proper rent had been reserved, a subsequent disposition to a religious house would be innocuous. A term of 99 years, such as that granted by the Ecclesiastical Commissioners here, would not have been regarded as tantamount to an alienation of the fee. Still less would a term of the length assigned to the company have been so regarded. If the term originally granted was not

[11] [1955] A.C. 145.
[12] [1916] 2 Ch. 57; 32 T.L.R. 509.
[13] [1894] 2 Ch. 557, 561.
[14] [1945] A.C. 68, 93.
[15] [1955] 1 Q.B. 1.

within the scope of the law of mortmain, an assignment of part of the term obviously would not have been affected.

The point was not taken in *Morelle Ld.* v. *Waterworth*[15] that under the old law if in the present circumstances there had been an assurance into mortmain the effect would have been that the reversion of the Ecclesiastical Commissioners would have been liable to forfeiture, for under the old law the subject-matter forfeited was in all cases the fee itself.

Under the old law forfeiture was not automatic: see Shelford, The Law of Mortmain (1836), p. 9; Co.Lit. 2b; and Tudor on Charities, 5th ed., p. 414. An assurance into mortmain rendered the interest liable to be forfeited, but forfeiture was not immediate. A distinct and well-established procedure had to be followed before it became effective. A corporation had capacity to take the land but not to hold it, and if the Crown put in a claim the corporation had to give up the land. But the right of forfeiture was subject to the prior like rights, in gradation, of the mesne lords, if any. It was quite clear under the Statute De Religiosis Viris that the fee did not go directly to the Crown.

The result in *Morelle Ld.* v. *Waterworth*,[15] therefore, involves holding that the Act of 1888, as amended in 1891, made two radical alterations in the pre-existing law, but the relevant provisions do not justify such a construction. First, so far as the inclusion of leaseholds is concerned, it is significant that the Act of 1888 related both to the law of mortmain and of charitable uses which had previously been the subject of the Georgian Mortmain Act, the Statute 9 Geo. 2. The inclusion in the definition of land in section 10 (iii) of the Act of 1888[16] of the phrase "any "estate and interest in land," which in *Attorney-General* v. *Graves*[17] was held to include leaseholds (and which was excluded by section 3 of the Act of 1891[18]), was attributable to the application of the Act of 1888 to charitable uses. The note in Tudor on Charities, 5th ed., p. 434, goes too far. All the cases cited in support are on the Georgian Mortmain Act and the note is inconsistent with what is said at p. 415.

Secondly, the Act of 1888 does not clearly provide that forfeiture is to be automatic. "Forfeiture" is an ambiguous word

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[15] [1955] 1 Q.B. 1.

[16] See note 1 on p. 382.

[17] (1752) Amb. 155.

[18] Mortmain and Charitable Uses Act, 1891, s. 3, as amended by the Statute Law Revision Act, 1908: "'Land' in the Mortmain and Charitable Uses Act, 1888, and in this "Act, shall include tenements and "hereditaments, corporeal or incorporeal, of any tenure, but not money "secured on land or other personal "estate arising from or connected "with land."

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and is used in two distinct senses throughout the statutes. It can mean either (a) shall be forfeited, or (b) "shall be liable to "be forfeited." In *In re Levy's Trusts* [19] the two meanings are made clear. It appears to have been used in both senses in section 1 of the Act of 1888. In section 1 (2) (iv) the sense is clearly "confiscated," but that is after the right of re-entry has been exercised. In section 1 (1), if "forfeited" is not given the other meaning, the further provision "may enter and hold" becomes mere surplusage, for the fee, if forfeited, must necessarily go at once to someone—there cannot be a gap during which it is not vested at all. It would be wrong to give effect to this ambiguous word so as to alter the pre-existing law. [Reference was also made to Roberts's Civil Proceedings by and against the Crown (1908), pp. 420, 423.]

C. N. Shawcross Q.C. and *J. P. Widgery*, for the plaintiff company, adopted the above argument, and added: As this matter concerns property it is necessary in accordance with R.S.C., Ord. 16, r. 11, that every necessary party should be before the court. The Crown, who was an essential party in *Morelle Ld.* v. *Waterworth*,[20] was not before the court, and, therefore, the decision must have been given per incuriam. Secondly, it is plain that the passage in Halsbury's Laws of England, 3rd ed., vol. 4, at p. 246, note (*h*), was not cited in *Morelle Ld.* v. *Waterworth*,[20] though Morris L.J. drew attention [21] to the passage at p. 83 of vol. 8 of the 2nd ed.: see the 3rd ed., vol. 9, at p. 73, where the decision in *Morelle Ld.* v. *Waterworth* [22] has been noted but the text has not been altered.

[Morris and Denning L.JJ. The passage in vol. 4 at p. 246 was not cited in *Morelle Ld.* v. *Waterworth*,[22] nor was *Doe* d. *Evans*, *Evans* v. *Evans*,[23] which supports the proposition at p. 73 of the 3rd ed., vol. 9, that the Crown may not enter before office found, referred to.]

In *Mayor, Aldermen and Citizens of Canterbury* v. *Wyburn* [24] the Judicial Committee of the Privy Council made it plain that the Act of 1888 was only a consolidating statute.

Gerald Gardiner Q.C. and *Greville Janner* for the defendant tenants. The argument that *Morelle Ld.* v. *Waterworth* [25] was decided per incuriam is not open in this court; but even if it could be taken, no new or convincing authority has been cited which was not then before the court; it is merely submitted that the argument might have been more fully developed. Both the vital submissions, that is, that the law of mortmain does not apply to short leases, and that forfeiture on an assurance into mortmain is not automatic, were made and rejected on the earlier occasion. It cannot be right that the decision of the court was given per incuriam merely because the Crown was not a party to the proceedings; the Crown is not a party now, and if that submission were to be accepted it could be raised in this case at a later stage. The submissions made are not within the principle of *Young* v. *Bristol Aeroplane Co. Ld.*[26] In that case the fourth and last class of cases which would be regarded as having been decided per incuriam was something of a very limited character, that is, that the decision must have been different if the court had been referred to a particular statute or statutory rule decisive of the issue, and that is not so here. [Reference was also made to *Williams* v. *Glasbrook Bros. Ld.*[27]]

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[19] (1885) 30 Ch.D. 119.
[20] [1955] 1 Q.B. 1.
[21] Ibid. 4.
[22] [1955] 1 Q.B. 1.
[23] (1826) 5 B. & C. 584, 587.
[24] [1895] A.C. 89.
[25] [1955] 1 Q.B. 1.

Sir Reginald Manningham-Buller Q.C., A.-G. replied.

On February 15, the court having indicated that the decision in *Morelle Ld.* v. *Waterworth* [28] was not given per incuriam, and stated that its reasons for so holding would be put into writing, submissions were made on the question whether that case was distinguishable because the title in the present case was registered at the Land Registry.

Sir Reginald Manningham-Buller Q.C., A.-G., said that the Crown was not concerned with this aspect of the case.

C. N. Shawcross Q.C. and *J. P. Widgery* for the plaintiff company. It is a cardinal principle of land registration that the registered interests are alone to be recognized. Prima facie, therefore, the effect of registration is to make an entry on the register incontestable until it has been rectified. That principle operates even where the entry on the register has been obtained by fraud or persuasion, though there is no question of that in the present case, because until the decision in *Morelle Ld.* v. *Waterworth* [28] it was not thought that the law of mortmain applied to short leases and the practice of the Land Registry embodied that view: see the footnote to rule 121 of the Land Registration Rules, 1925, contained in Brickdale and Stewart-Wallace on the Land

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[26] [1944] K.B. 718.

[27] [1947] 2 All E.R. 884.

[28] [1955] 1 Q.B. 1.

Registration Act, 1925, 3rd ed., at p. 434 (4th ed. (1939), at p. 380).

The principle is subject to certain exceptions. Section 80 of the Act of 1925 [29] preserves the right of the Crown to bona vacantia or forfeiture notwithstanding registration. That saving is, however, made subject to express provision to the contrary. In particular, so far as this case is concerned, it must be read with section 23,[29] which provides that a disposition for value of a registered leasehold estate is to be " deemed to vest " in the transferee the estate transferred free from the interests of the Crown.

The county court judge said that section 23 was confined to protecting the interests of third parties and, relying on a dictum of Romer J. in *Robert Batcheller & Sons Ld.* v. *Batcheller*,[30] he said that the provision that the interest should be " deemed to " vest " could not operate to protect the alleged interest of a party who with full knowledge that he had no title succeeded in getting his name on the register erroneously. But that dictum has been overruled by *Grundt* v. *Great Boulder Proprietary Mines Ld.*[31]; see now the Companies Act, 1948, Sch. I, Table A, art. 92. It is submitted that "deemed to vest" is equivalent to "shall confer" or " vest." The words " deemed to vest " were considered in *Rex* v. *Norfolk County Council*[32]; *Hill* v. *East & West India Dock*[33]; *Shepheard* v. *Broome*,[34] and *Reg.* v. *Westminster*

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[29] Land Registration Act, 1925, s. 23: " (1) In the case of a leasehold " estate registered with an absolute " title, a disposition (including a sub- " demise thereof) for valuable con- " sideration shall, when registered, be " deemed to vest in the transferee or " underlessee the estate transferred or " created to the extent of the regis- " tered estate, or for the term created " by the subdemise, as the case may " require, with all implied or expressed " rights, privileges, and appurtenances " attached to the estate transferred " or created . . . free from all other " estates and interests whatsoever, " including estates and interests of " His Majesty . . . (4) In the case " of a leasehold estate registered with " a possessory title, a disposition (in- " cluding a subdemise thereof) . . . " shall, when registered, have the " same effect as it would have had if " the land had been registered with " an absolute title. . . ."

S. 69: " (1) The proprietor of land " . . . shall be deemed to have vested " in him without any conveyance, " where the registered land is free- " hold, the legal estate in fee simple " in possession, and where the regis- " tered land is leasehold the legal term " created by the registered lease, . . ."

S. 80: " Subject to the express pro- " visions of this Act relating to the " effect of first registration of title " and the effect of registration of a " disposition for valuable considera- " tion, nothing in this Act affects any " right of His Majesty to any bona " vacantia or forfeiture."

[30] [1945] Ch. 169, 176; [1945] 1 All E.R. 522, 530.

[31] [1948] Ch. 145; [1948] 1 All E.R. 21.

[32] (1891) 60 L.J.Q.B. 379, 380.

[33] (1884) 9 App.Cas. 448, 454.

[34] [1904] A.C. 342.

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Unions Assessment Committee.[35] They do more than establish a prima facie case; they raise an irrebuttable presumption even if everyone knows that what is to be deemed to have vested has not in fact done so, or where it is not known whether it has vested. Section 69 [35a] of the Act of 1925 assimilates the provisions relating to freeholds and to leaseholds and makes it plain that the effect of registration of leaseholds is to be the same as that of freeholds, although in the case of freeholds the words used are "shall vest" (as in section 5) and in the case of leaseholds are "shall be deemed to vest." It is perhaps significant to note the further difference in language in section 20 where the words used in relation to a disposition of a freehold estate registered with absolute title are "shall confer." If a distinction had been intended between freeholds and leaseholds, one would have expected the same language to have been used throughout when referring to freeholds; it seems, therefore, as though the expressions may have been used loosely.

In re Suarez (*No.* 2) [36] is not in point, for there the first registration was after the escheat had taken place, but this was a disposition of a previously registered interest. Here the liability to forfeiture arose on the execution of the transfer, for that was the assurance into mortmain. An equitable interest can be forfeited under the Act of 1888. When the transferor purported to deal with this company, which had no licence in mortmain, he forfeited his interest. The forfeiture did not operate only from the date of the transfer of the legal estate.

[EVERSHED M.R. But the title remained in the transferor until registration was complete, subject to an equity in the transferee.]

The transferor was trustee for the transferee.

[ROMER L.J. The transferor does not seem to have been a trustee for the transferee. The transfer gave rise to a personal equity against the transferor, but it was not an assurance of an equitable interest within section 10 of the Act of 1888.]

But it was an assurance of land within section 1 of that Act.

[JENKINS L.J. There must have been a contract to convey, but a mere contract does not come within the Act.]

It is close to the mischief; there must be no purported dealing with the land giving the company an interest in land unless the company has a licence to hold land in mortmain. An assurance means any undertaking whereby a person to whom it is given acquires a right into or over land. Here some right was created immediately the transferor and the transferee purported to deal with this land.

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[35] [1917] 1 K.B. 832.

[35a] See note 29 on p. 388.

[36] [1924] 2 Ch. 19.

If, however, there is no "assurance" until registration is completed, it is the registration which constitutes the assurance into mortmain and the Mortmain Act operates to vest the interest in the Crown contemporaneously with the registration. On that footing the assurance would be automatically avoided and would be a nullity.

[Evershed M.R. The point made by Coke (Co.Lit. 2b) that a licence in mortmain is required not to take but to hold land seems more consistent with the conception that the land has to be got into the corporation's hand before it comes within the mischief of the Act.]

It would no doubt lean to that view. If so, what was registered was something which by the fact of registration became forfeited. That may seem absurd, but not more so than the effect of the decision in *In re Suarez* (*No.* 2)[37] that the self-constituted heir who registered when he knew that he had no title could nevertheless defeat any claim or right of the Crown.

Accepting that it is the transfer when registered which constitutes the assurance into mortmain, nevertheless until the entry is rectified the registered proprietor has an indisputable title against all the world. The entry on the register stands both as against the Crown and the tenant, who must go on paying rent to the registered proprietor until the register is rectified. This does not mean that the title is rehabilitated or revived by the registration, nor is the Crown precluded from applying for rectification, but until the title of the Crown is perfected by registration the company is entitled to go on dealing with the land. Rectification can be made either by the registrar or by order of the court, but no provision is made for rectification to be retrospective.

[Morris L.J. Could the county court judge have ordered rectification although the Crown had not asked for it?]

It is submitted that he could not on his own motion, but he could have given directions to the registrar. [Reference was made to *Chowood Ld.* v. *Lyall* (*No.* 2)[38] and to *In re Chowood's Registered Land*,[39] applied in *In re 139, Deptford High Street*.[40]]

Gardiner Q.C. and *Greville Janner* for the defendant tenants.

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[37] [1924] 2 Ch. 19.

[38] [1930] 2 Ch. 156.

[39] [1933] Ch. 574.

[40] [1951] Ch. 884; [1951] 1 All E.R. 950.

If *Morelle Ld.* v. *Waterworth* [41] is distinguishable on the ground that the present case is concerned with registered land, then *Rodnall Ld.* v. *Ludbrook*,[41] which was also concerned with registered land, was decided per incuriam, for the point was not taken and the court was told that the case was on all fours with *Morelle Ld.* v. *Waterworth.*[41]

The Act of 1925 should be construed on the footing that the difference in wording between the provisions relating to freeholds ("shall vest") and leaseholds ("shall be deemed to vest") reflects an intentional difference in meaning. Where a court is required to construe a statute on the footing that something which has not happened is to be deemed to have happened, the court is not merely entitled, but bound, to ascertain for what purposes and between what parties the hypothesis is to be applicable, and the burden of proving that the hypothesis applies is on the person who seeks to benefit by it: see *Wright* v. *Arnold* [42]; *Hill* v. *East & West India Dock*,[43] and *Ex parte Walton, In re Levy*,[44] which was followed, for example, in *Leitch* v. *Emmott.*[45] The primary purpose of the Land Registration Act, 1925, is, unlike the continental systems of land registration, to simplify conveyancing, not to create a title which cannot be disputed. The objects of the Act are summarized in *Attorney-General* v. *Odell.*[46] On the true construction of section 23 (1) "deemed to vest" is used in relation to the rights of bona fide third parties. The county court judge was right in saying that this section was never intended to protect a person who knew that he had no title to the interest in question but had somehow got himself on to the register. The purpose of the distinction between the language used in relation to leaseholds and freeholds is admittedly obscure; it may be that the formalities which have to be complied with when registering freeholds are more rigorous than those applicable to leaseholds.

[JENKINS L.J. In the case of leaseholds it is necessary to take possession; that is why the phrase "deemed to vest" was used for leaseholds but not for freeholds: see note (*c*) to section 9 of the Land Registration Act, 1925, in Brickdale and Stewart-Wallace, 4th ed., p. 90. The words were retained after the abolition of interesse termini.]

That would indicate that the use of the different words was intentional and was intended to convey a different meaning. Section 69 does not really add anything.

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[41] [1955] 1 Q.B. 1.

[42] [1947] K.B. 280; 62 T.L.R. 751; [1946] 2 All E.R. 616.

[43] 9 App.Cas. 448, 455.

[44] (1881) 17 Ch.D. 746, 756.

[45] [1929] 2 K.B. 236, 248.

[46] [1906] 2 Ch. 47, 69.

Forfeiture is now automatic and immediate; the requirement of an inquiry as a necessary preliminary to forfeiture was abolished by the Queen's Remembrancer Act, 1859. The forfeiture took effect on the execution of the transfer and the property now is in the Crown; there is no power of disclaimer comparable to that contained in sections 354 and 355 of the Companies Act, 1948; it does not necessarily follow, however, that the Crown is liable on all the incidents of the leasehold interest.

If, however, forfeiture did not take effect on the execution of the transfer, section 23 of the Act of 1925 can have no application here because registration will have preceded the forfeiture. There are three conditions precedent to the operation of the "deeming" provisions in section 23: (a) there must have been a disposition within the section; (b) valuable consideration must have been given; and (c) the interest must have been registered. Whether there has been a disposition depends on section 21 (5), which refers back to section 21 (1); a disposition in the prescribed manner, and that refers to section 144. Here the prescribed manner was as laid down by rule 121 of the Land Registration Rules, 1925 (S.R. & O., 1925, No. 1093/L.28), Form 35, note 1.[47] In the present case, however, that form was not used; if the proper form had been used the absence of a licence in mortmain would at once have been apparent. It is doubtful, therefore, whether this was a disposition within section 23, and the onus of proving that matter is on the company.

It may be that if the registrar, in exercise of the powers conferred by rules 74 and 322 (1), decides to accept an application for registration although it has been made on the wrong form, the registration cannot for that reason alone afterwards be impeached, but the "deeming" provisions in section 23 will not apply unless the proper form has been used. No doubt the registrar took the view that no licence was needed here, but that is not the point. Further, no evidence was called to prove that the transferor ever received valuable consideration for his interest. The receipt clause in the transfer is not in itself evidence.

It has been suggested that the transfer was not within the mischief of the Mortmain Acts until registration because the transferor was until then holding on trust for the transferee, but the Mortmain Acts apply equally to a transfer to A in trust for B where A has no licence, and to A in trust for C where A is entitled to hold but C is not. "Transfer" is not defined in the Mortmain Acts, but this would come within the mischief. If this is not a transfer, then the interest is still vested in the transferor.

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[47] Land Registration Rules, 1925, r. 121: "A transfer of land to an "incorporated company or other cor"poration, sole or aggregate, shall be "made by an instrument in Form 35, "and, save as mentioned in this rule, "shall refer to the licence in mortmain "or statute enabling the corporation "to acquire or hold the land."

C. N. Shawcross Q.C. in reply. The necessary consequence of the submission that section 23 does not apply unless the proper form has been used is that where the wrong form has been used, even if the registrar has accepted it, the registration, whether of absolute or possessory title and whether relating to a freehold or to a leasehold, has no effect. That would be directly opposed to the obvious intention and purpose of section 21 (5), in relation to leaseholds, and to section 18 (5), with regard to freeholds. Even in the case of fraud, registration is not a nullity save to the limited extent specified. The documents tendered by the company to the county court judge included the land certificate, which by section 68 is admissible as evidence of the matters therein contained, and it included sufficient prima facie evidence that valuable consideration was given and also that the registration was effected in due form.

Section 21 (5) should not be given a narrow construction; it applies to a disposition which complies substantially with the rules. If, however, this was an unauthorized disposition and is, therefore, a nullity, then there has not been any forfeiture and the rent is still payable to the transferor. If the forfeiture takes effect on registration, then there was no irregularity. But if the transfer constituted such a dealing with land as to give rise to a forfeiture, then no form applicable could provide for registration of that title. If so, it can be argued that the mere attempt to transfer to a company incapable of holding land is a nullity and the residue of the lease remains in the transferor and has never been forfeited to the Crown.

No distinction was intended between "deemed to vest" in section 23 and "shall vest" in section 5: see *Grundt* v. *Great Boulder Proprietary Mines Ld.*[48] It is said that Parliament intended to continue the use of the terms after the abolition of interesse termini. But in the absence of a clear indication of the purpose for which the different wording was used, the adoption of these two phrases in a consolidating Act must be taken to have been by inadvertence or on the assumption that the meaning and effect was precisely the same. There is no significant difference between the formalities for the registration of freeholds and leaseholds.

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[48] [1948] Ch. 145.

Section 105 of the Act of 1875, which saved the right of the Crown to bona vacantia and on a forfeiture, and corresponded to the present section 80, was worded differently and was not subjected to express provisions of the Act to the contrary. Therefore, the position is stronger now than it was when *In re Suarez* (*No.* 2)[49] was decided.

G. Cross Q.C. in reply. A person dealing with a registered proprietor is not concerned to see that the prior registration was properly made. It is essential that third parties should be able to deal safely with the registered proprietor without inquiry as to whether the registration was in the proper form. The difficulty here arose because the registrar wrongly satisfied himself that no licence in mortmain was required. Section 69 has the effect of giving the registered proprietor a valid and indefeasible title even though there has not been a disposition and transfer presented at all. The idea of the Land Registration Act was to equate the holding of land with a share register, so that by obtaining registration, however improperly, the legal estate would vest in the registered proprietor, though of course proceedings could be taken to rectify. The fact that provision is made for rectification contemplates that someone has got on to the register who had no title prior to registration. *Chowood Ld.* v. *Lyall* (*No.* 2)[50] and *In re 139, Deptford High Street*[51] were both cases of mistaken registration.

Cur. adv. vult.

March 3. EVERSHED M.R. read the following judgment of the court: The plaintiff company, the appellant in this court, is a company incorporated in Dublin according to the laws of Eire, and it claims in the present proceedings to be the proprietor of a leasehold interest in premises known as 158, Coldharbour Lane, London, S.E.5. The action is one for alleged arrears of rent from tenants occupying a part of the premises. The defences raised in the action included a challenge to the plaintiff company's title to sue on the ground that since the plaintiff company is a foreign corporation having no business or address in England, and since it has neither availed itself of the provisions of section 408 of the

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[49] [1924] 2 Ch. 19.

[50] [1930] 2 Ch. 156.

[51] [1951] Ch. 884.

Companies Act, 1948, nor has it a licence in mortmain, so as to entitle it to hold land in this country, the interest which the plaintiff company claims to have in the premises in question had, prior to the initiation of the present proceedings, been forfeited to the Crown. The defendant tenants rely particularly upon the decision of this court in the earlier case in which the plaintiff company was involved, *Morelle Ld.* v. *Waterworth.*[1]

In the case just mentioned (which I will hereafter refer to as the " first *Morelle* case " [1]) two distinct points were raised. First, was the assurance to the plaintiff company of the unexpired residue of a term of years in house property in London an assurance of land in mortmain within the terms of section 1 of the Mortmain and Charitable Uses Act, 1888? Second, if so, was the term so assured automatically forfeited to the Crown by virtue of the same subsection? Both these questions were answered affirmatively by this court. Both questions turned on the proper interpretation of the relevant terms of the Mortmain and Charitable Uses Acts, 1888 and 1891.

It is not in dispute that the only distinction between the present case and the first *Morelle* case [1]—though it may be a distinction of substance—is that, in the present case, the land in question (which, like that in the earlier case, is the subject of an unexpired residue of a term of years) is registered land, and that the name of the plaintiff company has been inserted on the Land Register in respect of that land as proprietor thereof with a possessory title. It has been accordingly contended, unsuccessfully in the county court, on behalf of the plaintiff company that such registration has, in any event, given to the plaintiff company a good title to the land and, accordingly, to sue in this action, notwithstanding the effect of the Mortmain Acts, unless and until the Crown or some other person entitled to make application obtains rectification of the register.

It will be convenient to refer now to the relevant provisions of the Acts of 1888 and 1891. [His Lordship read section 1 (1) of the Act of 1888, which is in Part I of the Act entitled " Mort-" main," and continued:] Subsection (2) of the section contains a number of provisos of which, having regard to the nature of the argument later discussed, paragraph (iv) is of some significance. [His Lordship read the paragraph and continued:] Section 10 contains certain definitions, and it is to be observed that these definitions relate equally to Part I of the Act relating to mortmain and to Part II relating to charitable uses. The material definitions are: "(i) 'Assurance' includes a gift, conveyance, appointment, "lease, transfer, settlement, mortgage, charge, incumbrance, "devise, bequest, and every other assurance by deed, will, or other "instrument; and 'assure' and 'assuror' have meanings corre-"sponding with assurance. . . . (iii) 'Land' includes tenements "and hereditaments corporeal and incorporeal of whatsoever "tenure, and any estate and interest in land." The last-mentioned definition was replaced by section 3 of the Mortmain and Charitable Uses Act, 1891 (as later amended by the Statute Law Revision Act, 1908). [His Lordship read the section.] It will be observed that the effect of the amendment by the Act of 1891 has been to exclude from the definition of land, for the purposes of both Acts, the formula "any estate and interest in land."

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[1] [1955] 1 Q.B. 1; [1954] 2 All E.R. 673.

When this appeal was first called on in December last before Evershed M.R., Birkett and Romer L.JJ., it was suggested, having regard to the importance of the matters involved and since we were informed that a number of properties were similarly affected, that an opportunity should be given to the Attorney-General to attend the appeal and put forward such arguments as he thought fit as amicus curiae. The case was adjourned accordingly, and the Attorney-General has availed himself of the opportunity which we gave. We are greatly indebted to the Attorney-General and to Mr. Cross for their very considerable assistance in a difficult matter. On the appeal again coming on before a full court, the first point raised by the Attorney-General was that the Crown should be added as a party to the proceedings as being (within the terms of R.S.C., Ord. 16, r. 11) a party "who ought to have been joined, or whose presence before the "court may be necessary in order to enable the court effectually "and completely to adjudicate upon and settle all the questions "involved in the cause or matter . . ." We decided to postpone our decision upon this application until we had heard the argument upon the whole case, and we shall deal hereafter with it. It may be stated, however, that though the apparent interest of the Crown would be to support the Court of Appeal's conclusion in the first *Morelle* case,[2] in reality this is found not to be so: for, if the leasehold terms in question have vested in the Crown, then the Crown would presumably be liable upon the covenants contained in the leases, including the covenants relating to repairs and delivery up. As we have stated, the alleged interests of the plaintiff company in the present case and in the first *Morelle* case [2] are interests in the unexpired residues of terms of years. In the present case the term of years expires in 1964. It is plain that the Crown have not thought it right or in its proper interests to seek to support the decision in the first *Morelle* case [2] and of the county court judge in the present appeal.

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[2] [1955] 1 Q.B. 1.

The next point, accordingly, taken by the Attorney-General, was that the decision of this court in the first *Morelle* case [2] was erroneous and, having been arrived at per incuriam, was open now to review and ought not to be followed by this court. Mr. Shawcross, who appeared on behalf of the plaintiff company, felt a difficulty in arguing this point himself—assuming, since this is a county court appeal, that it was sufficiently taken in the court below. The main argument upon this question was accordingly presented to us by the Attorney-General and Mr. Cross as amici curiae.

At our invitation the Attorney-General and Mr. Cross put before us the general character of the argument upon which they would rely in support of their main contention, namely, that this court, in the first *Morelle* case,[2] had reached an erroneous conclusion upon one or both of the two questions then submitted to it and above formulated. In so putting this main contention counsel for the Crown informed us of the authorities upon which they relied, but they did not refer specifically to more than a few of them: nor did they fully elaborate their argument. But they then submitted their case for saying that this court had decided the first *Morelle* case [2] per incuriam; and we heard this part of the argument upon the basis of the correctness of the Attorney-General's main contention.

This main contention was to the following effect: (1) The Mortmain and Charitable Uses Act, 1888, is by its own title an Act to consolidate and amend the law relating to mortmain. (2) This Act and the amending Act of 1891 should, therefore, according to well-established principle and authority (see, for example, *In re Budgett* [3] and *Aristoc Ld.* v. *Rysta Ld.*[4]) be construed, so far as their terms fairly admit, in conformity with the law relating to mortmain as it previously stood—particularly as it stood according to the terms of the confirmation of Magna Carta, 9 Hen. 3, c. 36,[5] and the Statute De Religiosis Viris,

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[2] [1955] 1 Q.B. 1.

[3] [1894] 2 Ch. 557.

[4] [1945] A.C. 68, 93; 61 T.L.R. 121; [1945] 1 All E.R. 34.

[5] Magna Carta, 1225 (confirmation) (9 Hen. 3, c. 36): "It shall "not be lawful from henceforth to "any to give his lands to any "religious house, and to take the "same land again to hold of the same "house. Nor shall it be lawful to "any house of religion to take the

1279, 7 Edw. 1.[6] (3) The earlier law relating to mortmain was based essentially on the conception of the feudal tenure of land. (4) Thus (*a*) the dispositions struck at were dispositions of the fee, and leaseholds were excluded from its scope, except in so far as a leasehold term was in duration such as to be practically equivalent to a freehold; (*b*) alternatively, an assignment of a relatively short unexpired residue of a term of years, such as those in question in the present and the first *Morelle* [7] cases, was never comprehended by the law relating to mortmain; (*c*) the penalty for infringing the provisions of the law relating to mortmain was liability to forfeiture (following a distinct and established procedure) and not an automatic forfeiture; (*d*) moreover, the right of forfeiture in the Crown was subject to the prior like rights, in gradation, of the mesne lords, if any; (*e*) the subject-matter forfeited was in all cases the fee itself. (5) Finally, in construing the relevant terms of the Mortmain and Charitable Uses Act, 1888, it is of the highest significance that the statute related both to the law relating to mortmain and also to that relating to charitable uses (previously the subject of the statute 9 Geo. 2 [8]), and the inclusion in the definition of land in section 10 (iii) of the phrase "any estate and interest in land," which was excluded by the amending Act of 1891, was attributable to the application of the Act to charitable uses.

It was clear to us that this argument had involved considerable research and reference to some of the oldest authorities in our law, and would have taken no little time to develop fully. We did not, in the circumstances, hear the answer which Mr. Gardiner was prepared to offer. For, whether or not, if we were free to treat the matter as res integra, we should arrive at a different

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"lands of any, and to lease the same "to him of whom he received it. If "any from henceforth give his lands "to any religious house, and thereupon be convict, the gift shall be "utterly void, and the land shall "accrue to the lord of the fee."

[6] Statute De Religiosis Viris, 1279 (7 Edw. 1): ". . . That no person, religious or other . . . buy "or sell . . . lands or tenements, or "under the colour of gift or lease, "or that will receive by reason of "any other title, whatsoever it be, "lands or tenements, or by any other "craft or engine will presume to "appropre to himself, under pain of "forfeiture of the same, whereby such "lands or tenements may any wise "come into mortmain. We have "provided also, That if any person, "religious or other, do presume either "by craft or engine to offend against "this statute, it shall be lawful to "us and other chief lords of the fee "immediate, to enter into the land "so aliened, within a year from the "time of the alienation, and to hold "it in fee as an inheritance."

[7] [1955] 1 Q.B. 1.

[8] 1736 (9 Geo. 2, c. 36). An Act to restrain the disposition of lands, whereby the same become unalienable.

answer to either or both of the material questions from those given by this court in the first *Morelle* case,[9] it is clear that we cannot now reopen those questions at all unless we can properly hold that the decision of this court in the first *Morelle* case [9] was given per incuriam so as, consistently with the judgment of this court in *Young* v. *Bristol Aeroplane Co. Ld.*[10] to leave the matter at large for our independent decision.

We have carefully considered the judgments and the report of the arguments in the first *Morelle* case [11] as they appear in the Law Reports. We have also had available to us the notes made during the hearing of that case by Denning and Morris L.JJ. With this material before us it has been impossible, in our judgment, to fasten upon anything in the judgments in the first *Morelle* case,[11] or upon any step in the reasoning on which those judgments were based, and to say of it: " Here was a manifest " slip or error."

It is true that the argument formulated for us by the Attorney-General and Mr. Cross was not (as it clearly appears) so fully or carefully formulated on the former occasion. In particular, it does not appear that the point was made or at all comparably emphasized that the Act of 1888, being an Act only to consolidate and amend the previous relevant law, must be so construed as prima facie not intended to bring about substantial changes in that law. But, as we have already said, and as we venture to emphasize, the question before that court was one of the true interpretation of the language in fact used by Parliament in the Acts of 1888 and 1891. It is, we think, manifest that section 1 of the Act of 1888 is widely different from that of the statute of 7 Edw. 1—which is, indeed, not surprising, having regard to their respective dates. Thus, as regards forfeiture, the statute of 7 Edw. 1 lays it down [in (2)] that any prohibited transaction should be " under pain of forfeiture " and continues [in (3)] to provide that in the event of any person offending against the statute " it shall be lawful to us and other chief lords of the fee " immediate, to enter into the land so aliened, within a year " from the time of the alienation . . ."

On the other hand, whatever be the true sense in which the words " shall be forfeited " are used at the end of subsection (1) of section 1 of the Act of 1888, it seems clear, as the Attorney-General observed and conceded, that the same words in paragraph

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[9] [1955] 1 Q.B. 1.

[10] [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293.

[11] [1955] 1 Q.B. 1.

(iv) of subsection (2) of the same section refer inevitably as a matter of language to a forfeiture taking effect immediately. And although there have been several decisions of the courts (named by the Attorney-General) upon the scope of the old law relating to assurances in mortmain, there has been none upon the relevant terms of the Act of 1888, except the case before Wills J. of *Truro Corporation* v. *Rowe*,[12] which is not binding on this court and which was criticized in the second edition of Halsbury's Laws of England, vol. 8, p. 83, n. (*g*) (see now 3rd ed., vol. 9, p. 73, n. (1)), on the ground that the attention of the court had not been directed to the terms of the definitions in section 10 of the Act of 1888. Further, there is no doubt, in our judgment, that the old law relating to mortmain, including the effect, as it had been understood, of the statute of 7 Edw. 1, was clearly put to this court in the first *Morelle* case,[13] if less fully or elaborately than upon the present occasion; and this court in the first *Morelle* case [13] deliberately expressed its conclusion upon the question whether, as a matter of construction of the Acts of 1888 and 1891, the old view as to the non-applicability of the law of mortmain to relatively short terms of years or to an assignment of the unexpired residues of such terms still held good [14]; and also upon the question what effect should be given (in the light of the earlier law) to the terms of section 1 (1) of the Act of 1888 as to forfeiture to Her Majesty. It is also clear, from the judgment of Singleton L.J.,[15] that the court had also in mind the effect of section 3 of the Act of 1891, which removed from the definition of "land" in the Act of 1888 the words "any estate and interest in land."

In delivering the judgment of this court in *Young* v. *Bristol Aeroplane Co. Ld.*, Lord Greene M.R. thus stated the effect of the rule stare decisis in its application to the Court of Appeal [16]: "In considering the question whether or not this court is bound "by its previous decisions and those of courts of co-ordinate juris-"diction, it is necessary to distinguish four classes of case. The "first is that with which we are now concerned, namely, cases "where this court finds itself confronted with one or more decisions "of its own or of a court of co-ordinate jurisdiction which cover "the question before it and there is no conflicting decision of "this court or of a court of co-ordinate jurisdiction. The second

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[12] [1901] 2 K.B. 870; 17 T.L.R. 773; [1902] 2 K.B. 709; 18 T.L.R. 820.

[13] [1955] 1 Q.B. 1, 4.

[14] Ibid. 8, 12.

[15] Ibid. 6.

[16] [1944] K.B. 718, 725.

"is where there is such a conflicting decision. The third is "where this court comes to the conclusion that a previous "decision, although not expressly overruled, cannot stand with a "subsequent decision of the House of Lords. The fourth (a "special case) is where this court comes to the conclusion that a "previous decision was given per incuriam. In the second and "third classes of case it is beyond question that the previous "decision is open to examination. In the second class, the court "is unquestionably entitled to choose between the two conflicting "decisions. In the third class of case the court is merely giving "effect to what it considers to have been a decision of the House "of Lords by which it is bound. The fourth class requires more "detailed examination and we will refer to it again later in this "judgment."

Lord Greene M.R. returned to the fourth class, which is that now relevant, when he said [17]: "It remains to consider the quite "recent case of *Lancaster Motor Co. (London) Ld.* v. *Bremith* "*Ld.*,[18] in which a court consisting of the present Master of the "Rolls, Clauson L.J. and Goddard L.J., declined to follow an "earlier decision of a court consisting of Slesser L.J. and Romer "L.J.[19] This was clearly a case where the earlier decision was "given per incuriam. It depended on the true meaning (which "in the later decision was regarded as clear beyond argument) of "a rule of the Supreme Court to which the court was apparently "not referred and which it obviously had not in mind. The Rules "of the Supreme Court have statutory force and the court is "bound to give effect to them as to a statute. Where the court "has construed a statute or a rule having the force of a statute "its decision stands on the same footing as any other decision "on a question of law, but where the court is satisfied that an "earlier decision was given in ignorance of the terms of a statute "or a rule having the force of a statute the position is very "different. It cannot, in our opinion, be right to say that in "such a case the court is entitled to disregard the statutory "provision and is bound to follow a decision of its own given "when that provision was not present to its mind. Cases of this "description are examples of decisions given per incuriam. We "do not think that it would be right to say that there may not "be other cases of decisions given per incuriam in which this "court might properly consider itself entitled not to follow an

[17] [1944] K.B. 718, 728.

[18] [1941] 1 K.B. 675; 57 T.L.R. 418; [1941] 2 All E.R. 11.

[19] In *Gerard* v. *Worth of Paris Ld.* [1936] 2 All E.R. 905.

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"earlier decision of its own. Such cases would obviously be of "the rarest occurrence and must be dealt with in accordance "with their special facts. Two classes of decisions per incuriam "fall outside the scope of our inquiry, namely, those where the "court has acted in ignorance of a previous decision of its own "or of a court of co-ordinate jurisdiction which covers the case "before it—in such a case a subsequent court must decide which "of the two decisions it ought to follow; and those where it has "acted in ignorance of a decision of the House of Lords which "covers the point—in such a case a subsequent court is bound "by the decision of the House of Lords.

"On a careful examination of the whole matter we have "come to the clear conclusion that this court is bound to follow "previous decisions of its own as well as those of courts of "co-ordinate jurisdiction. The only exceptions to this rule (two "of them apparent only) are those already mentioned which for "convenience we here summarize: (1) The court is entitled and "bound to decide which of two conflicting decisions of its own "it will follow. (2) The court is bound to refuse to follow a "decision of its own which, though not expressly overruled, "cannot, in its opinion, stand with a decision of the House of "Lords. (3) The court is not bound to follow a decision of its "own if it is satisfied that the decision was given per incuriam."

Some further light has been thrown upon the meaning and scope of the term "per incuriam" by later decisions. In the first, *Police Authority for Huddersfield* v. *Watson*,[20] a Divisional Court of the King's Bench Division, consisting of Lord Goddard C.J., Atkinson and Lewis JJ., held that that court was, like the Court of Appeal and upon similar principles, bound by previous decisions of its own. In delivering the judgment of the court the Lord Chief Justice said[21]: "What is meant by giving "a decision per incuriam is giving a decision when a case or a "statute has not been brought to the attention of the court and "it has given its decision in ignorance or forgetfulness of the "existence of that case or that statute." Applying that principle the Divisional Court held itself bound by the earlier decision of the same court in *Garvin* v. *Police Authority for City of London*.[22]

In a later case of *Nicholas* v. *Penny*,[23] concerned with the question whether evidence of a speedometer reading was prima facie evidence of the speed recorded, the Divisional Court, consisting of Lord Goddard C.J., Humphreys and Morris JJ., held themselves not bound by a previous decision in *Melhuish* v. *Morris* [24] on the ground that that case had been decided per incuriam. Lord Goddard C.J. said [25]: "But, without necessarily "saying that we can always differ from a previous decision of "the Divisional Court merely because it has not been argued on "both sides, the court is not obliged to follow that decision, for "it has been laid down by the Court of Appeal in *Young* v. "*Bristol Aeroplane Co. Ld.*,[26] which has been followed quite "recently in this court, that where material cases or statutory "provisions, which show that a court has decided a case wrongly, "were not brought to its attention the court is not bound by "that decision in a subsequent case. Two remarkable cases "which might have been cited to the court in *Melhuish* v. "*Morris* [27] if the case had been argued on both sides were not "cited to it, and those cases, I think, would have had a "considerable influence on that decision."

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[20] [1947] K.B. 842; 63 T.L.R. 415; [1947] 2 All E.R. 193.

[21] [1947] K.B. 842, 847.

[22] [1944] K.B. 358; 60 T.L.R. 207; [1944] 1 All E.R. 378.

[23] [1950] 2 K.B. 466; 66 T.L.R. (Pt. 1) 1122; sub nom. *Penny* v. *Nicholas* [1950] 2 All E.R. 89.

A third case to which we were referred by the Attorney-General was that of *A. & J. Mucklow Ld.* (*in liquidation*) v. *Inland Revenue Commissioners*,[28] in this court. The case was concerned with the validity of a direction given under section 21 of the Finance Act, 1922 (as amended by section 31 of the Finance Act, 1927), in respect of the so-called "broken accounting period" up to the commencement of the appellant company's winding up, on the ground that the company had not for such period distributed a reasonable amount of its income to its members. It was in that case contended by the Crown (who were held by this court entitled on other grounds to succeed) that a direction given under the section in respect of a broken period was inescapable; and the Crown relied in support of that contention upon the language of Lord Hanworth M.R. and (more particularly) of Slesser L.J. in an earlier case of *H. Collier & Sons Ld.* v. *Inland Revenue Commissioners*.[29] This court held that they were not bound by the opinions of the majority of the court in the earlier case on the ground (among others) that those opinions proceeded upon a premise which was admittedly erroneous, such premise being inconsistent with an authority binding on the Court of Appeal

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[24] [1938] 4 All E.R. 98.
[25] [1950] 2 K.B. 466, 472.
[26] [1944] K.B. 718.
[27] [1938] 4 All E.R. 98.
[28] [1954] Ch. 615; [1954] 2 All E.R. 508.
[29] [1933] 1 K.B. 488; 49 T.L.R. 46; 18 T.C. 83.

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which had not been cited in *Collier's* case.[29] In *Mucklow's* case Evershed M.R. said[30]: "It is conceded that Slesser L.J. "fell into error in supposing that in cases falling under the "original Act the commissioners had a duty to ascertain any "'reasonable' figure which fixed the limits of tax liability. "*Colville Estate Ld.* v. *Inland Revenue Commissioners*[31] was "not cited to the Court of Appeal in *Collier's* case.[32] In "*Colville's* case[33] it had been clearly held that if in such a "case as I am supposing, that is, one falling under the terms "of the original Act of 1922, a company had not distributed a "reasonable part of its actual income, then the members were "liable to be taxed in respect of the whole of that income "and not a reasonable part only of it; and that view of the "section was later approved in the House of Lords in *Fattorini's* "case[34]" [*Thomas Fattorini (Lancashire) Ld.* v. *Inland Revenue Commissioners*] "*per* Lord Atkin,[35] *per* Lord Mac- "millan,[36] and *per* Lord Wright.[37] It was argued that the error "into which Slesser L.J. fell was nevertheless not essential to "the ratio of his decision of the case. As a matter of strict "logic, it may be that the conclusion was independent of the "false premise. The question is, however, not whether, as a "matter of logic, the conclusion depended on the premise, but "whether Slesser L.J. thought that his conclusion followed from "the antithesis which he had earlier stated; and I am very far "from satisfied that, if it had not been for his view of the effect "of the original section and of the contrast which he consequently "discerned from the introduction of the formula 'available for "'distribution, etc.,' he would ever have formed the view which "he did of the meaning of that formula. For my part, there- "fore, I should be prepared to hold that the judgment of "Slesser L.J., if it would otherwise be authoritative, can be "reviewed in this court (within the principle of *Young* v. *Bristol* "*Aeroplane Co. Ld.*[38]) on the ground that it was delivered, in "this essential respect, per incuriam, or that a material part "of the reasoning on which the conclusion rests is inconsistent "with later pronouncements (in *Fattorini's* case[39]) of the House "of Lords." Evershed M.R. then referred to the judgment of

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[29] [1933] 1 K.B. 488.
[30] [1954] Ch. 615, 635.
[31] [1930] 2 K.B. 393; 15 T.C. 485.
[32] [1933] 1 K.B. 488.
[33] [1930] 2 K.B. 393.
[34] [1942] A.C. 643; [1942] 1 All E.R. 619; 24 T.C. 328.
[35] Ibid. 655.
[36] Ibid. 660.
[37] Ibid. 663.
[38] [1944] K.B. 718.
[39] [1942] A.C. 643.

Lord Hanworth M.R. and concluded [40]: "I think also that the "disabling quality in the judgment of Slesser L.J. must, as a "consequence, equally affect that of Lord Hanworth M.R."

Jenkins L.J., in the same case, after saying [41] that he felt "considerable difficulty" as to *Collier's* case,[42] and after referring [43] to Slesser L.J.'s "misapprehension" and to the fact that the views of Lord Hanworth M.R. and Slesser L.J. upon the point raised in *Mucklow's* case [44] were not necessary to the decision in *Collier's* case,[45] said [46]: "For the reasons I have "stated, I cannot regard the circumstances in which the majority "judgments in *Collier's* case [47] were delivered as wholly satis-"factory, and having regard to those circumstances, to the "probability that the court was consequently denied the assist-"ance of anything comparable to the very full argument "addressed to us in the present case, and to the fact that it was "unnecessary for the purpose of deciding the case then before "the court to express any opinion on this aspect of the construc-"tion of section 31 (4), I think that those are substantial grounds "for the view that we would be justified in holding that it should "not be considered as a binding authority for the proposition "that section 31 (4) is automatic in its effect."

In the light of these authorities it was the contention of the Attorney-General that the question whether a decision had been given per incuriam was not to be determined according to any hard-and-fast rule but was one of degree, depending upon the special circumstances of the case. He referred to the language of Lord Greene M.R., which we have earlier quoted [48]: "We do "not think it would be right to say that there may not be other "cases of decisions given per incuriam" (i.e., other than decisions given in ignorance or forgetfulness of a statute or a rule having the force of a statute) "in which this court might properly "consider itself entitled not to follow an earlier decision of its "own. Such cases would obviously be of the rarest occurrence "and must be dealt with in accordance with their special facts." In the first *Morelle* case [49] (so ran the Attorney-General's argument) the circumstances were of a very special and unusual character; and he referred particularly to the subject-matter, the law relating to mortmain, which is of a specialized and highly technical character and which very infrequently comes before the courts; to the fact that the arguments were brief, counsel for the plaintiff company having only been instructed in the afternoon before the case came on for hearing; and to the absence of any sufficient emphasis, consequently, upon the connexion of the law relating to mortmain with the feudal conception of land tenure, and upon the fact that the Act of 1888 was a consolidating and amending statute.

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[40] [1954] Ch. 615, 637.
[41] Ibid. 648.
[42] [1933] 1 K.B. 488.
[43] [1954] Ch. 615, 650.
[44] [1954] Ch. 615.
[45] [1933] 1 K.B. 488.
[46] [1954] Ch. 615, 650.
[47] [1933] 1 K.B. 488.
[48] [1944] K.B. 718, 729.
[49] [1955] 1 Q.B. 1.

We have been unable to accept this argument. As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene M.R., of the rarest occurrence. In the present case it is not shown that any statutory provision or binding authority was overlooked, and while not excluding the possibility that in rare and exceptional cases a decision may properly be held to have been per incuriam on other grounds, we cannot regard this as such a case. As we have already said, it is, in our judgment, impossible to fasten upon any part of the decision under consideration or upon any step in the reasoning upon which the judgments were based and to say of it: "Here "was a manifest slip or error." In our judgment, acceptance of the Attorney-General's argument would necessarily involve the proposition that it is open to this court to disregard an earlier decision of its own or of a court of co-ordinate jurisdiction (at least in any case of significance or complexity) whenever it is made to appear that the court had not upon the earlier occasion had the benefit of the best argument that the researches and industry of counsel could provide. Such a proposition would, as it seems to us, open the way to numerous and costly attempts to re-open questions now held to be authoritatively decided. Although, as was pointed out in *Young* v. *Bristol Aeroplane Co. Ld.*,[50] a "full court" of five judges of the Court of Appeal has no greater jurisdiction or higher authority than a normal division of the court consisting of three judges, we cannot help thinking that, if the Attorney-General's argument were accepted, there would be a strong tendency in cases of public interest and importance, to invite a "full court" in effect to usurp the function of the House of Lords and to reverse a previous decision of the Court of Appeal. Such a result would plainly be inconsistent with the maintenance of the principle of stare decisis in our courts.

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[50] [1944] K.B. 718.

In conclusion upon this point we would add that we are unable to accept Mr. Shawcross' suggestion that the decision in the first *Morelle* case [51] should be regarded as per incuriam on the ground that a necessary party to the proceedings, viz., the Crown, was not before the court. A decision cannot, in our judgment, be treated as given per incuriam simply because of a deficiency of parties.

We, therefore, hold that the decision in the first *Morelle* case [51] is binding upon us.

It remains to consider the contention that this case is distinguishable from the first *Morelle* case [52] on the grounds that the land here in question is registered land, and that the assurance in mortmain was effected by means of a transfer for valuable consideration from the previous registered proprietor, one Desmond Dixon, to the plaintiff company, completed by the registration of the plaintiff company as proprietor in succession to the transferor.

We should note that *Rodnall Ld.* v. *Ludbrook*,[53] decided by this court at the same time and in the same way as the first *Morelle* case,[54] was in fact a case of registered land, but it was decided without separate argument, on the admission of counsel that it was indistinguishable from the first *Morelle* case.[54] Accordingly, if and so far as the fact and effect of registration are found on examination to afford valid grounds for distinguishing the first *Morelle* case [54] from the present case, we are free to make the distinction. On that assumption there can be no doubt that *Rodnall Ld.* v. *Ludbrook* [54] was decided per incuriam, for it was decided in disregard of the statutory provisions which (on the assumption now made) distinguished it in truth from the first *Morelle* case.[54]

The facts regarding the registered title to the land now in question, namely, the leasehold interest under a lease for 99 years from December 25, 1865, in No. 158, Coldharbour Lane, London, S.E.5, are briefly these. The land was first registered with a possessory title on July 19, 1904. The immediate predecessor in title of the plaintiff company, Desmond Dixon, was registered as proprietor on November 26, 1951. The instrument of transfer from Desmond Dixon to the plaintiff company was dated December 20, 1952, and was expressed to be made in consideration of the sum of £85, the receipt whereof was thereby acknowledged by Dixon, the plaintiff company being therein described as having its registered office at 8, Upper O'Connell Street, Dublin, Eire. The plaintiff company was registered as proprietor on January 27, 1953, with the address "care of Yamild Ld., 128, "Albany Street, N.W.1." There is no evidence showing in detail the order in which the various stages of the transaction were carried out. It seems likely that there was an antecedent contract for the sale and purchase of the property, but this is not proved. Nor is it shown when the £85 was in fact paid by, and the instrument of transfer delivered to, the plaintiff company. It seems likely again, however, that in accordance with the usual practice the £85 was paid against delivery to the plaintiff company of the executed transfer together with the Land Certificate, that the plaintiff company thereafter applied for registration, producing these documents to the Land Registry, and that registration was granted after the usual notice by the registry to Dixon as the registered transferor. There would thus have been an interval of some five weeks between the payment of the purchase price and the completion of the transfer by registration on January 27, 1953, that is, on the assumption that the price was in fact paid on the date borne by the transfer, namely, December 20, 1952.

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[51] [1955] 1 Q.B. 1.

[52] Ibid.

[53] Ibid.

[54] Ibid.

It was argued by Mr. Shawcross, for the plaintiff company, that, forfeiture or no forfeiture, the plaintiff company as the registered proprietor of the land (that is to say, the leasehold interest comprised in the registered title) must, under the provisions of the Land Registration Act, 1925, be considered as owner of the land for all purposes, including the right to recover and receive the rent payable by tenants of the land holding immediately under such owner, as the defendant tenants do, at all events until such time as the right of the Crown to the land by forfeiture may be asserted and established in proceedings for rectification of the register. This, in Mr. Shawcross' submission, flows as a necessary consequence from the cardinal principle of land registration that registered interests alone are to be recognized.

But the cardinal principle upon which Mr. Shawcross relies is subject to certain exceptions. In particular, section 80 of the Land Registration Act, 1925, contains a saving of the rights of the Crown. [His Lordship read section 80 and continued:] This means, as we understand it, that registered land is to be forfeited to the Crown in any case in which it would have been so forfeited if unregistered, save in so far as the sections of the Act concerning the effect of first registration and the registration of dispositions for valuable consideration expressly provide that these operations are to discharge the land from any right of the Crown by way of forfeiture.

The provisions of the Act as to first registration are not directly material here, but we quote them as having some bearing upon the arguments addressed to us. Section 5 of the Act provides, with respect to freeholds, that: "the registration of any "person as first proprietor thereof with an absolute title shall vest "in the person so registered an estate in fee simple in possession "in the land, together with all rights, privileges, and appurtenances belonging or appurtenant thereto," subject as therein mentioned: "but free from all other estates or interests whatsoever, including estates or interests of His Majesty." Sections 6 and 7 apply the provisions of section 5 to the cases of first registration of freeholds with a possessory or qualified title, with modifications as to which it is sufficient for the present purpose to note that, where the first registration is of a possessory title only, estates, rights and interests adverse to the title of the first proprietor and subsisting at the time of first registration are not affected. Section 9 of the Act provides with respect to leaseholds that: "the registration under this Act of any person as first "proprietor thereof with an absolute title shall be deemed to vest "in such person the possession of the leasehold interest described, "with all implied or express rights, privileges, and appurtenances "attached to such interest," subject as therein mentioned, "but "free from all other estates and interests whatsoever, including "estates and interests of His Majesty." Sections 10, 11 and 12 apply the provisions of section 9 to the cases of first registration of leaseholds with a good leasehold, possessory, or qualified title, subject to modifications which, where the title is possessory only, are comparable to those applicable to the first registration of freeholds with a possessory title only.

The effect of these provisions would seem to be that if a corporation not authorized by statute, charter or special licence to hold land in mortmain were to acquire unregistered land, thereby incurring a forfeiture under the Act of 1888, and thereafter were to obtain registration of itself as first proprietor of the land with absolute title, such registration would vest in such corporation the fee simple estate in the land in the case of freeholds, or be deemed to vest in such corporation the possession of the leasehold interest in the case of leaseholds, free from the estate or interest which had in fact accrued to the Crown by reason of the forfeiture: *cf. In re Suarez (No. 2).*[55] But that is not this case.

As to the effect of registration of a disposition for valuable consideration, which is the material operation for the purposes of the present case, section 20 of the Act provides, by subsection (1), with respect to freeholds registered with an absolute title that: " a disposition of the registered land . . . for valuable consideration shall, when registered, confer on the transferee . . . an " estate in fee simple . . . or other legal estate expressed to be " created in the land dealt with . . .", subject as therein mentioned: " but free from all other estates and interests whatsoever, " including estates and interests of His Majesty, and the disposition shall operate in like manner as if the registered transferor " . . . were (subject to any entry to the contrary in the register) " entitled to the registered land in fee simple in possession for his " own benefit." Subsections (2) and (3) of the same section apply the provisions of subsection (1) with modifications to registered dispositions for value of freeholds registered with qualified or possessory title. These modifications include where the title is possessory only a saving of the estates, rights and interests excluded from the effect of first registration.

With respect to leaseholds, section 23 (1) of the Act provides that: " In the case of a leasehold estate registered with an " absolute title, a disposition . . . for valuable consideration shall, " when registered, be deemed to vest in the transferee . . . the " estate transferred . . . to the extent of the registered " estate . . .", subject as therein mentioned, " but free from all " other estates and interests whatsoever, including estates and " interests of His Majesty; and the transfer . . . . shall operate " in like manner as if the registered transferor . . . were (subject " to any entry to the contrary on the register) absolutely entitled " to the registered lease for his own benefit." Subsections (2), (3) and (4) of the same section apply the provisions of subsection

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[55] [1924] 2 Ch. 19.

(1) with modifications to the case of registered dispositions for value of leaseholds registered with good leasehold, qualified or possessory title, the last-mentioned being the class of title with which we are here concerned. The modifications applicable where the title is possessory only are comparable to those applicable to freeholds registered with possessory title only, and relating as they do to the title of the first registered proprietor are not material in the present case.

The effect of these provisions for the present purpose would appear to be that if registered land had been transferred to a corporation not authorized to hold land, and the transfer had been completed by the registration of such corporation as proprietor of the land transferred, the transferee corporation could thereafter by a registered disposition for valuable consideration vest the land in the purchaser thereof free of the forfeiture which had in fact been incurred by reason of the transfer in mortmain to such corporation. But that is not this case. The forfeiture here in question was brought about by the registered disposition itself, by reason of the incapacity of the transferee, the plaintiff company, to hold land in mortmain, and we cannot construe the provisions of sections 20 and 23 of the Act as extending to any forfeiture so occasioned. Those provisions are designed to protect a purchasing transferee from defects in the transferor's title, such as a forfeiture, subsisting at the date of the transfer against the registered estate in the transferor's hands, and not to relieve such a transferee from a defect in the transferee's own title, such as a forfeiture arising on completion of the transfer by reason of the transferee's own lack of authority to hold land in mortmain. The transfer is, by section 23 (1) (to take the section directly in point here) made to "operate in like manner as if the registered "transferor . . . were (subject to any entry to the contrary in the "register) absolutely entitled to the registered lease for his own "benefit," and not as if the registered transferor were so entitled and the registered transferee, if in fact a corporation not authorized to hold land in mortmain, were authorized to do so.

In the course of the argument there was some discussion as to the point of time at which the forfeiture arose. It was suggested that the contract for the sale of the land by Dixon to the plaintiff company, if indeed there was any antecedent contract (as to which there was no evidence), or at all events the payment of the purchase-money against delivery of the executed transfer, constituted Dixon a trustee of the land for the plaintiff company, and that this sufficed to work a forfeiture under the Act of 1888.

We find difficulty in accepting this proposition. It is not clear to us that a man who contracts to sell land to a corporation not authorized to hold land in mortmain, even though he receives the purchase-money, incurs or creates a forfeiture at any time before actual conveyance. The contract would not be specifically enforceable and, therefore, could hardly give rise to a constructive trust. If the vendor refused to complete, prima facie, the only remedy of the purchaser corporation would be to recover any purchase-money paid as money had and received to its use. We say nothing as to the effect of an express declaration of trust in favour of such a corporation, and are referring only to a contract of sale and purchase to be carried out by conveyance in the ordinary way. Moreover, in the present case, the transaction was a sale and purchase of registered land intended to be carried out and, in fact, carried out by means of a transfer completed by registration under the Act. We note that by section 22 (1) "A "transfer of the registered estate in the land . . . shall be "completed by the registrar entering on the register the transferee "as proprietor of the estate transferred, but until such entry is "made the transferor shall be deemed to remain the proprietor "of the registered estate . . ." Accordingly, we think the better opinion is that there was no forfeiture here until the completion by registration of the transfer from Dixon to the plaintiff company. But if we are wrong in this, and if the contract for sale, or the receipt of the purchase-money, sufficed to work a forfeiture on the ground that Dixon thereby constituted himself a trustee for the plaintiff company, how does the case stand? On this assumption the position was that immediately before the registration of the transfer Dixon was a registered proprietor who had incurred or created a forfeiture, while the plaintiff company had no interest at all; for ex hypothesi the forfeiture worked contemporaneously with the arising of the trust, which in any case had no effect on the registered title. Dixon then effected a disposition for valuable consideration of the registered estate in the land to the plaintiff company, and by force of section 23 of the Act, that disposition when registered operated to vest the registered estate in the plaintiff company free of the forfeiture occasioned by the arising of the trust in its favour. But that same disposition when registered brought about a new forfeiture operating against the registered estate in the hands of the plaintiff company by reason of the plaintiff company's want of authority to hold land in mortmain, and this forfeiture was not touched by the overreaching effect accorded to registered dispositions for value by section 23.

Accordingly, we are of opinion that the result is the same even if (contrary to our view) a forfeiture was incurred at any stage in the transaction earlier than the actual completion of the sale by registration of the plaintiff company as proprietor, and that the plaintiff company cannot escape the forfeiture consequent upon the registration of the disposition for value in its favour on the ground that there was an earlier forfeiture from which the land was freed under section 23 by the registration of such disposition. If this were not so the strange result would ensue that transfers for value of registered land to corporations not authorized to hold land in mortmain could always be made without giving rise to a forfeiture of the land in the hands of the transferee corporation.

For these reasons the fact that the present case concerns registered land does not in our opinion afford any valid ground for distinguishing the first *Morelle* case.[56] The express provisions of the Act relating to the effect of registration of a disposition for valuable consideration, that is to say (so far as leaseholds are concerned) the provisions of section 23, include no provision which can properly be construed as freeing the land from the forfeiture incurred by the registered transfer to the plaintiff company. Accordingly, by virtue of section 80 of the Act, such forfeiture took effect upon the registration of the transfer, just as it would have done on the execution and delivery of an assignment of unregistered leaseholds, and, as we are bound to hold following the first *Morelle* case,[56] took immediate and automatic effect without any act or proceeding on the part of the Crown to assert or establish it. This forfeiture being, as we have held, unaffected by the provisions of the Land Registration Act, it follows that it took effect without rectification of the register and was not suspended pending an order for rectification or contingent upon such an order being obtained.

A good deal of the argument was directed to the use of the word " deemed " in section 9, where the registration of a person as first proprietor of a leasehold interest is to be " deemed to " vest " in such person possession of the interest described, and in section 23 where the registration of a disposition for valuable consideration of a registered leasehold interest is to be " deemed

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[56] [1955] 1 Q.B. 1.

"to vest" in the transferee the estate transferred, another example being in section 69, where the registered proprietor of land is to be "deemed to have vested in him . . . the "legal estate . . ." It was said on the one hand that the effect of "deeming" a man to have property vested in him is that he is to be treated as having it vested in him, whether in fact he has it vested in him or not. On the other hand, it was said that "deemed" means deemed for the purposes of the Act, and only so far as those purposes require, the relevant purposes here being the protection of third parties dealing with the registered proprietor for value and in good faith. Several authorities bearing upon this point were cited. We find it difficult to attach any great significance to the use of the word "deemed" in sections 9, 23 and 69 of the Act, as section 5 provides with respect to the first registered proprietor of a freehold estate that registration "shall vest in the person so registered an estate in fee "simple . . . " with no deeming about it; and again, section 20 provides with respect to a registered disposition for value of a freehold estate that the disposition when registered "shall . . . "confer," not "shall be deemed to confer," on the transferee an estate in fee simple or other legal estate appropriate to the transaction. It can hardly have been intended that the effect of the registration of the first proprietor of a leasehold interest, or the registration of a transfer for value of a leasehold interest, was to differ from the effect of like transactions in regard to freehold estate in any respect other than such as flows from the inherent differences between a freehold and a leasehold estate. There may perhaps have been technical conveyancing reasons for these variations in language. At all events we cannot extract from them anything of assistance in the determination of the present case, which, to our mind, turns simply upon the absence in section 23 of any express provision to oust the saving of the Crown's right of forfeiture contained in section 80.

Before parting with this case we should refer to a point as to the form of the transfer to which Mr. Gardiner called our attention. Rule 121 of the Land Registration Rules, 1925, provides by sub-paragraph (1) as follows: "A transfer of land to "an incorporated company or other corporation, sole or aggregate, "shall be made by an instrument in form 35, and, save as mentioned in this rule, shall refer to the licence in mortmain or "statute enabling the corporation to acquire or hold the land." Form 35 is in the following terms, after the heading: "Pursuant "to a licence . . . ", "I, A.B., of *etc.* [*the proprietor*] hereby "transfer to (blank) [*fill in the corporate name of the transferee*], "all the land [*etc.*, . . .]" as in the earlier form 19 or 20. Then there is a note: "If the licence or statute contains any limit to "the extent of land which may be conveyed or held, or any "provisions as to the purposes for which it may be used, add at "the end of the form: 'And it is hereby declared that the land "'already held by the transferees under such licence (or Act), "'together with the land hereby transferred, does not exceed "'(blank) acres (*or* that no land other than that hereby transferred is held by the transferees), and that the present transfer "'is for the purposes of [*fill in the purposes for which the land* "'*is to be used*].'"

Rule 121 was not followed in the present case, and the transaction was carried out by the common form of transfer, which was accepted for registration, although it was apparent from the description of the plaintiff company as having its registered office at 8, Upper O'Connell Street, Dublin, Eire, that it was a foreign corporation. If rule 121 had been followed the plaintiff company would never have been registered as proprietors. The reason why rule 121 was not followed appears from the view expressed in this footnote to the rule contained in Brickdale and Stewart-Wallace on the Land Registration Act, 1925, 3rd ed., at p. 434 [4th ed. (1939), at p. 380]. The note is: "Leasehold land is not within "the Mortmain Acts unless the lease is virtually perpetual, and "leases for twenty, forty, and even ninety-nine years have been "expressly held to be exempt (see Tudor's Charitable Trusts, "[5th ed. (1929), p. 415; 4th ed. (1906), p. 429], and, ibid., the "note to section 1 of the Mortmain Act, 1888)."

That being the view of the law on which the registrar, no doubt on competent legal advice, was accustomed to act, it appeared unnecessary to insist on the use of form 35 on a transfer of short leaseholds to a corporation, as that form only differs from the common one in its references to the licence in mortmain, which would be inappropriate on the view that short leaseholds were not within the Mortmain Acts. That view has now been shown by the first *Morelle* case[57] to have been erroneous, and no doubt the practice of the Land Registry will be altered accordingly.

It was suggested that this departure from the rules might have invalidated the transfer in the present case, but the point was not pressed, and we are satisfied that the transfer was not so invalidated. The rule-making power is conferred by section 144 (1) of the Act, which empowers the Lord Chancellor with the advice and assistance of the Rule Committee therein mentioned to make general rules (inter alia): "(ii) For prescribing the forms "to be observed, the precautions to be taken, the instruments to "be used, the notices to be given, and the evidence to be adduced "in all proceedings before the registrar or in connexion with "registration . . . ", and by subsection (2) any rules made in pursuance of that section are to be of the same force as if enacted in the Act.

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[57] [1955] 1 Q.B. 1.

Accordingly, if the rules categorically enjoined that a particular form and none other should invariably be used for transactions of a particular kind the use of a different form for a transaction of that kind might be held to invalidate the transaction. But rule 74 provides: "The forms in the schedule hereto shall be "used in all matters to which they refer, or are capable of being "applied or adapted, with such alterations and additions, if any, "as are necessary or desired and the registrar allows." Rule 123, subrule (1) provides: "A transfer of land under the last two "rules shall not be registered until the registrar is satisfied that "such transfer is in accordance with the law relating to mortmain "or charitable uses," and rule 322, subrule (1) provides: "The "registrar, if he so thinks fit, may, in any particular case, extend "the time limited, or relax the regulations made by general rules, "for any purpose; and may at any time adjourn any proceeding, "and make any new appointment."

The registrar is thus given a wide discretion as to the forms to be used, and his discretion extends to authorizing a departure from the general rules if satisfied that he can properly do so. It follows that, although the present transaction was completed otherwise than in accordance with rule 121, owing to the adoption in the registry of a view as to the law of mortmain now held to be erroneous, the acceptance for registration of the form of transfer used, such acceptance being in law the act of the registrar, must be taken as conclusive of its sufficiency in point of form. The contrary view would lead to much difficulty and uncertainty in the administration of the Act, as a person dealing with the registered proprietor of land might find it necessary to go behind the facts of his registration and inquire into the sufficiency in point of form of the disposition on the strength of which such registration was

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made. For the reasons we have stated we think this appeal should be dismissed.

Appeal dismissed with costs.
Leave to appeal granted.
Application on behalf of the Crown to be joined as a party refused, and leave to appeal against refusal not granted.

Solicitors: *S. A. Bailey & Co.; Barnett Janner & Davis; Treasury Solicitor.*

E. D.

BOND AIR SERVICES LD. *v.* HILL.

1955
May 3, 4, 11.

Lord Goddard C.J.

Insurance — Warranty — Burden of proof — Observance by insured of conditions of policy condition precedent to insured's right to recover—Onus on insurers to prove compliance by insured with conditions.

Burden of Proof—Contract—Condition. Practice—Pleadings—Condition—Breach—R.S.C., Ord. 19, *r.* 14.

By a clause in a Lloyd's insurance policy against the loss or damage to an aeroplane, owned by the claimants, it was provided: "The observance and performance by the insured of the conditions "of this policy so far as they contain anything to be observed or "performed by the insured are of the essence of the contract and "are conditions precedent to the insured's right to recover here-"under." On a claim against the underwriters in respect of the loss of the aeroplane, the underwriters contended that the claimants could not recover under the policy without first proving compliance with the conditions:—

Held, that as it was always for an insurer to prove an exception, so it was for him to prove the breach of a condition which would relieve him from liability in respect of a particular loss: accordingly, the onus was on the underwriters to prove, if they could, that the claimants had failed to comply with the conditions.

Stebbing v. *Liverpool and London and Globe Insurance Co. Ld.* [1917] 2 K.B. 433; 33 T.L.R. 395 applied.

Geach v. *Ingall* (1845) 14 M. & W. 95 and *Ashby* v. *Bates* (1846) 15 M. & W. 589 explained.

Special case stated by an arbitrator.

The claimants, Bond Air Services Ld., were the owners of a Halifax aeroplane. By a policy of insurance dated November 13, 1947, which was subscribed to by, inter alios, the respondent, Ernest Reginald Hutchinson Hill, ~~the respondent~~, to the extent of his proportion, insured the claimants against loss or damage to the aeroplane and third party liability arising from the use of the aeroplane. The policy contained, amongst others, the following conditions: "7. The insured and all persons in his employment "or for whom he is responsible shall duly observe the statutory "orders regulations and directions relating to air navigation for "the time being in force. 8. The observance and performance "by the insured of the conditions of the policy so far as they "contain anything to be observed or performed by the insured "are of the essence of the contract and are conditions precedent "to the insured's right to recover hereunder."

On May 23, 1948, the aeroplane was engaged in a flight from Valencia, Spain, to Bovington Airport in this country, when it crashed in a field containing a crop of barley some six miles from the airport. The claimants claimed against the respondent that he was liable to indemnify them under the policy to the extent of £86 12s. for the loss of the aeroplane and for the claimants' liability for the damage to the crops. The respondent disputed this claim and the dispute was referred to arbitration.

Paragraph 5 of the the points of defence purported to put the claimants to proof of the observance and performance by them of the conditions of the policy in four respects as follows: (1) That the aircraft was at all material times being flown in compliance with article 3 (ii) of the Air Navigation Order, 1923, in accordance with the conditions of its certificate of airworthiness as to maximum weights. (2) That the aircraft was at all material times being flown in compliance with article 3 (iii) and Schedule 2, paragraphs 8 and 9 of the Order by personnel as there provided, and by a licensed pilot. (3) That there were carried in the aircraft and maintained in a fit condition for immediate use in compliance with article 14 of the Order instruments prescribed by the Air Navigation Directions, 1936, and, in particular, an artificial horizon. (4) That the claimants had complied with the condition of the policy that, after any accident, the insured should produce to the insurers all such log-books, estimates, vouchers, explanations and information as the insurers should reasonably require, and verify the correctness thereof in such manner as the insurers should reasonably require.

Paragraph 6 of the points of defence alleged that the respondent was not liable to the claimants because, in breach of the conditions, (1) the aircraft was at all material times loaded in excess of the weights permitted in the certificate of airworthiness, thus invalidating the certificate; (2) the artificial horizon of the aircraft was not maintained in a fit condition for immediate use; (3) the claimants did not produce such estimates, vouchers, etc., as the respondent might reasonably require as to the load and weight of the aircraft.

At the hearing before the arbitrator the respondent contended that the claimants could not recover the sum claimed without proving (1) the four matters stated in paragraph 5 of the points of defence, and (2) that they had not committed the three breaches of condition alleged in paragraph 6. The claimants denied this contention, arguing that it was not obligatory for them to prove compliance with the conditions, but that it was for the respondent to prove, if he could, that they had failed to comply with the conditions, and that the burden of such proof was on the respondent.

In the opinion of the arbitrator, the conditions in question were of the nature of promissory warranties as defined in section 33 (1) of the Marine Insurance Act, 1906, namely, undertakings by the assured that some particular thing should or should not be done, or that some condition should be fulfilled. The purpose of condition 8 was to state the effect which should be given to those undertakings. They were to be no less than conditions precedent to the underwriter's liability, so that, if they were not complied with, the underwriter should not be liable to make a payment under the policy. Without condition 8 it might be a matter for argument whether a breach of one of those undertakings discharged the underwriter from liability; condition 8 put the matter beyond argument. It gave the other conditions of the policy an effect similar to that given by section 33 (3) of the Marine Insurance Act, 1906, to the promissory warranties in a policy of marine insurance; if they were not complied with the underwriter was discharged from liability. In the arbitrator's opinion, it was a general rule applicable to all promissory warranties given by the assured that, unless the policy expressly provided to the contrary, the underwriter must prove the breach. Whether or not there was such a general rule, putting the burden of proof on the underwriter, there was, so far as he could see, nothing in the nature of the conditions here which distinguished them in this respect from the implied warranty of seaworthiness.

In his opinion condition 8 of the policy had no effect on the burden of proof, its sole effect being to give the assured's undertakings the character of warranties or conditions, and it was for the respondent to prove that the claimants had failed to comply with the conditions of the policy.

The question for the court was whether the contentions of the respondent or those of the claimants were correct.

J. R. Bickford-Smith for the respondent. The insurers put in issue three matters: (1) whether the aircraft was overloaded; (2) whether certain instruments were serviceable; and (3) whether all information required by the insurers had been given. The insurers say that compliance with conditions of the policy in relation to these matters was a condition precedent to liability. It is so expressly provided in clause 8 of the policy. The burden of proving compliance with conditions precedent is, as a universal rule, on the plaintiff; compliance is an essential part of his case. This has always been the law and practice.

Until the New Rules of 1834 * the plaintiff had to plead conditions precedent and performance in detail. The New Rules permitted general plea of performance.

[LORD GODDARD C.J. The New Rules were supposed to simplify procedure and complicated it beyond belief. When you aver generally performance of a condition precedent, then it is for the defendant to say: "I am going to contest that condition." Then that puts the burden on the plaintiff to prove performance.]

That was certainly the position under the New Rules. *Geach* v. *Ingall* [1] and *Ashby* v. *Bates*,[2] decided under the New Rules, make it clear that where performance of a condition precedent is contested the onus is on the plaintiff.

[LORD GODDARD C.J. The report in *Ashby* v. *Bates* [2] distinguishes between replying "de injuria" and concluding with a "verification." Do you know the difference?]

Was not one a traverse and the other confession and avoidance?

[LORD GODDARD C.J. Yes. In *Crogate's* case [3] Crogate had replied "de injuria" and not by a verification and failed on that account. He complained bitterly in Hades to Baron Surrebutter (alias Parke B.) that he could not understand why he should have admitted what was untrue. A reply "de injuria" put the whole pleadings in issue.]

The effect of the New Rules as to pleading of performance of a condition precedent was repeated in section 57 of the Common Law Procedure Act, 1852. The position is now governed by

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* Regulae Generales, Hilary Term, 1834.

[1] (1845) 14 M. & W. 95.

[2] (1846) 15 M. & W. 589.

[3] Holdsworth's History of English Law, vol. 9, p. 417.

R.S.C., Ord. 19, r. 14, which is to the same effect, except that the general plea of performance is now implied and does not have to be expressed. But it is still a necessary ingredient of the plaintiff's case: see Bullen and Leake, 10th ed., p. 136.

The arbitrator thought that, despite the words "condition "precedent" in clause 8, the clause was not such, but the words merely indicated that it was a condition that went to the root of the contract. Two things are provided for in clause 8: (1) that observance and performance should be of the essence of the contract, and (2) that it should be a condition precedent to liability. The arbitrator failed to give effect to (2).

[Lord Goddard C.J. He regarded the clause as a promissory warranty. May there not be a distinction between a condition as to something which has happened before the contract is concluded, such as arose in the two life insurance cases you rely on, and matters occurring after the contract was entered into?]

It is submitted no. Certainly in the case of promissory warranties in marine insurance the same principles apply to warranties whether they relate to past or future events. Further, even if the arbitrator was right in regarding these conditions as analogous to promissory warranties in marine insurance, he was wrong as to the burden of proof. Where warranties are express, it is for the insured to prove compliance. Only in the case of an implied warranty of seaworthiness is it for the insurers to prove a breach: see Arnould on Marine Insurance, 14th ed., vol. 2, p. 1168.

It is said that breach of the condition as to overloading being a criminal offence the burden of proving a breach of it is on the person alleging the breach. The answers to that are (*a*) the policy provides otherwise; (*b*) some of the conditions are not concerned with criminal offences; and (*c*) whether or not a particular act is an offence against the regulations is a matter to be determined and it is therefore premature to decide whether they are criminal or not. Furthermore, many of the matters to be proved are within the peculiar knowledge of the insured.

In *Goldstein* v. *Salvation Army Assurance Society*[4] it was held that the onus of proving the performance of one of the conditions in the policy was on the insurance company, but there the wording of the policy was different; the condition was not stated to be a condition precedent and the decision on the point was obiter. In *London Crystal Window Cleaning Co. Ld.* v. *National*

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[4] [1917] 2 K.B. 291.

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Mutual Indemnity Insurance Co. Ld.[5] it was conceded that the onus was on the insurance company to show that there was a breach of the condition in that case, whereas no such concession is made in the present case. Here it is expressly provided that the observance and performance of the conditions are conditions precedent to the insured's right to recover and, therefore, the burden of proving compliance is on the claimants.

N. R. Fox-Andrews Q.C. and *S. H. Noakes* for the claimants. The two cases in Meeson and Welsby are the only cases which give any support to the respondent's argument. In both of them the claimants asked for and were granted the right to begin. Those cases have never been cited in any other case, possibly because they were not regarded as good authorities. There is no modern authority which supports the respondent's contention. If the insured proves that the policy is in force, and that the loss has occurred from a peril insured against, then the burden shifts. The fact that a condition is expressed to be a condition precedent does not affect the burden of proof in any way.

[LORD GODDARD C.J. There is the doctrine that if a fact is peculiarly within the knowledge of one person the burden is on him to prove it.]

There is also the doctrine that the burden is on him who alleges the fact. [*Webster* v. *General Accident Fire and Life Assurance Corporation Ld.*[6] was referred to.]

[LORD GODDARD C.J. The only way that the insurer can tell whether a condition has been complied with is by questioning the assured. That is shifting the burden to the assured.]

If the insurers are right in their contention there would be very few cases of recovery from insurers.

[LORD GODDARD C.J. If it was a condition of the policy, for example, that the journey log should be kept on the aeroplane, the maxim omnia praesumuntur rite esse acta would probably apply, but it cannot be right to say that it is presumed that everything has been done because it is a condition precedent.]

In Welford's Accident Insurance, 2nd ed., p. 101, it is stated that the onus of proving both that what has been done or left undone amounts to a breach of condition lies on the insurers. Once a valid contract is established and also a loss, he who seeks to excuse himself must show why he should be excused. *Trickett* v. *Queensland Insurance Co. Ld.*[7] relates to an exception, and it

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[5] [1952] 2 Lloyd's Rep. 360, 363.

[6] [1953] 1 Q.B. 520; [1953] 1 All E.R. 663.

[7] [1936] A.C. 159; 52 T.L.R. 164.

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was not disputed that the onus of proving that the case fell within the exception was on the insurers.

[LORD GODDARD C.J. There is no doubt that the onus with regard to an exception is always on the insurers. The question is what is the position where the insurer is relying on a condition precedent.]

There is a difference as regards onus of proof depending on whether a condition is a condition precedent to the formation of the policy or to liability on an existing policy. In the first place the onus is on the person alleging that he is insured; in the second place the onus is on the insurer: see Welford, p. 96.

In support of the contention that, breach of some of the conditions being criminal offences, the onus of proving the breach is on the insurer, *Williams* v. *East India Co.*[8] lays it down as a rule of law that "where any act is required to be done on the one "part, so that the party neglecting it would be guilty of criminal "neglect of duty in not having done it, the law presumes the "affirmative, and throws the burden of proving the contrary . . . "on the other side." In *Joseph Constantine Steamship Line Ld.* v. *Imperial Smelting Corporation Ld.*,[9] a case of frustration, it was held that a promisor who relied on the frustration was not bound to prove affirmatively that it was brought about by his neglect or default. Here if the aircraft, for example, was flown in excess of the permitted speed the claimants are being asked to prove that they did not so fly. If it is being said that the claimants have broken a condition it is also said that they have brought about an avoidance of the policy.

[LORD GODDARD C.J. The respondent is not trying to avoid the policy, but merely to resist the claim for indemnity in respect of a particular risk. There is no doubt that if the respondent sought to avoid the policy the onus would be on him.]

Although the *Constantine* case [9] was concerned with frustration, the opinions of Viscount Maugham [10] and Lord Wright [11] go to the essence of the present case. The decision in *Barrett* v. *Jermy* [12] is very strongly in favour of the claimants. [*Joel* v. *Law Union and Crown Insurance Co.*[13] was also referred to.]

A condition precedent should be treated as similar to an exception in conformity with the general trend of cases. [Reference was made to *Pearl Life Assurance Co.* v. *Johnson.*[14]] In

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[8] (1802) 3 East 192.

[9] [1942] A.C. 154, 160; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[10] [1942] A.C. 154, 173.

[11] Ibid. 192.

[12] (1849) 3 Exch. 535, 542.

[13] [1908] 2 K.B. 863, 880, 885.

[14] [1909] 2 K.B. 288, 295.

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Stebbing v. *Liverpool and London and Globe Insurance Co. Ld.*[15] a policy contained a clause to the effect that compliance with the conditions indorsed on the policy should be a condition precedent to any liability on the part of the insurers, and a condition provided that, if any false statement was made in support of a claim, all benefit under the policy should be forfeited. It was held that the burden of proving that a statement was untrue was on the insurers. That case is very much in point here. In *John T. Ellis Ld.* v. *Walter T. Hinds* [16] it is made clear that it is always for the insurers to establish an exception. The conditions precedent in the present case could be described as exceptions, i.e., exceptions relating to the scope of the policy and exceptions by which the assured is said not to be covered unless he has secured the existence of a certain state of things.

[LORD GODDARD C.J. Welford, at p. 113, draws a distinction between exceptions and conditions.]

[*Davidson* v. *Burnand* [17]; *Barrett* v. *London General Insurance Co.*[18]; *Piedmont, etc., Life Insurance Co.* v. *Ewing, etc.*[19]; *In re Hooley Hill Rubber and Chemical Co. and Royal Insurance Co.*,[20] and *Levy* v. *Assicurazioni Generali* [21] were referred to.] The whole trend of cases supports the claimants' proposition, in particular, *Stebbing's* case.[22]

Bickford Smith in reply. Where there is a condition precedent either of the existence of a contract or of the performance of it the burden is on the assured, e.g., in a contract of sale delivery of goods is a condition precedent or concurrent to the right to sue for the price and must be proved.

[LORD GODDARD C.J. One has to distinguish between a condition precedent and consideration.]

The obligation to give information to insurers after loss may be made a condition precedent. The opinion of Lord Watson in *London Guarantie Co.* v. *Fearnley* [23] summarizes the respondent's argument on what is or is not a condition precedent. Where parties to a contract of insurance agree that certain conditions shall be conditions precedent the courts should give effect to that agreement: *per* Lord Watson.[24] If insurers are not to be in a position of insisting on strict adherence to conditions there would be no insurance, or at least very high premiums. In the present case the conditions were clearly conditions precedent. [*Welch* v. *Royal Exchange Assurance* [25] was referred to.]

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[15] [1917] 2 K.B. 433.

[16] [1947] K.B. 475; 63 T.L.R. 181; [1947] 1 All E.R. 337.

[17] (1868) L.R. 4 C.P. 117.

[18] [1935] 1 K.B. 238; 51 T.L.R. 97.

[19] (1875) 92 U.S. 377.

[20] [1920] 1 K.B. 257, 273; 35 T.L.R. 483.

[21] [1940] A.C. 791; 56 T.L.R. 851; [1940] 3 All E.R. 427.

[22] [1917] 2 K.B. 433.

[23] (1880) 5 App.Cas. 911.

[24] Ibid. 919.

The reason for placing the onus on the claimant is because he is the dominus of the arbitration. He has the means of bringing the case to trial. There is no distinction for the present purposes between the existence of the policy and liability under it. A condition precedent to the existence of the policy merely occurs at an earlier stage of proof so that failure to establish its existence leaves no contract.

In *Barrett* v. *Jermy* [26] it is necessary to look at the policy and the pleading. There was there a condition defeasant. The reason for the decision in *Stebbing's* case [27] was that on the face of it the latter part of the condition was inconsistent with it being a condition precedent: compare *London Guarantie Co.* v. *Fearnley*,[28] *per* Lord Blackburn.

In Williston on Contracts (published in the U.S.A.), para. 674, the editor points out that, under the modern system of pleading, although the plaintiff is allowed to make a general allegation of the performance of conditions and the defendant must indicate what breaches of conditions he relies on as an excuse for non-performance, this does not change the ultimate burden of proof which remains on the plaintiff.

Cur. adv. vult.

May 11. LORD GODDARD C.J. read the following judgment: This is a special case stated by an arbitrator on a point of law arising in the course of a reference, and raises an interesting question with regard to the burden of proof in a claim under a policy of insurance. The policy in question was a Lloyd's aircraft policy, and the claim is made in respect of the total loss of the plane covered, which was the property of the claimants, and for a small amount for which the owners are said to be liable in respect of some damage to crops caused by the crash of the plane. The loss occurred as long ago as May 23, 1948, and, though arbitration proceedings were started soon after and the points of claim and defence were delivered in July, 1949, the reference did not come on for hearing until November, 1954. The accident happened on a flight from Spain to this country, and quite near to the aerodrome to which the plane was bound.

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[25] [1939] 1 K.B. 294; 55 T.L.R. 96; [1938] 4 All E.R. 289.

[26] 3 Exch. 535.

[27] [1917] 2 K.B. 433.

[28] 5 App.Cas. 911, 916.

The policy contained several general conditions, and condition 8 provides: "The observance and performance by the insured of "the conditions of this policy so far as they contain anything "to be observed or performed by the insured are of the essence "of the contract and are conditions precedent to the insured's "right to recover hereunder." Condition 7 provides that: "The "insured and all persons in his employment or for whom he is "responsible shall duly observe the statutory orders regulations "and directions relating to air navigation for the time being in "force." The underwriters have sought to put the claimants to the proof that this condition was fulfilled in respect of four specified matters, and further allege three breaches of other conditions. Before the arbitrator the respondent contended that, as the observance and performance of the conditions by the claimants and their servants were conditions precedent to their right to recover, the burden of proving compliance was upon them. The arbitrator has held against that contention, and that it is for the respondent to prove the breach of all or any of the conditions. He held that the sole effect of condition 8 is to give the assured's undertakings the character of warranties or conditions, and that it leaves the onus of proof untouched.

I do not think that it can be doubted that, ordinarily, it is for the underwriter to prove a breach of condition, at least where he is not contending that the policy is void on the ground that there has been a breach of a condition precedent to the formation of the policy. So, too, it is for him to prove an exception. The difference between a condition and an exception is that the former places some duty or responsibility on the assured, while the latter restricts the scope of the policy. That it is for the insurers who allege that the conditions were broken to prove it, has, I think, always been accepted, at least since Baron Parke's judgment in *Barrett* v. *Jermy*.[1] Mr. Bickford Smith has contended in a learned and interesting argument that, as the policy provides that the observance of the conditions is a condition precedent to the assured's right to recover, it is for him to prove observance so that the onus is shifted. For this he relies mainly on *Geach* v. *Ingall*[2] and *Ashby* v. *Bates*.[3] Both these cases were concerned with conditions precedent of the policy and related to the truth of the answers made in the proposal forms.

The New Rules of 1834 (which were supposed to do so much towards simplifying special pleading, if not practically to abolish it, and were unfortunately proved to have exactly the opposite effect), were then in force, and a perusal of the amusing skit of *Crogate's Case*,[4] and the dynamic results which a replication de injuria could have, written by Hayes J. and to be found in volume 9 of Sir William Holdsworth's History of English Law, p. 417, will show how, notwithstanding the rules, the learned Baron Surrebutter—a thin disguise for Lord Wensleydale—managed in spite of them to retain the niceties and the almost unintelligible subtleties of the special pleader's art. These rules, however, did make it unnecessary for a plaintiff to set out all the conditions precedent in detail in his declaration, but enabled a general averment of conditions precedent to be sufficient. But, in the hope that the real issue would emerge from the pleadings, a defendant must distinctly specify in his plea any condition precedent the performance or occurrence of which was intended to be contested.

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[1] (1849) 3 Exch. 535, 542.

[2] (1845) 14 M. & W. 95.

[3] (1846) 15 M. & W. 589.

It was held in both *Geach* v. *Ingall*[5] and *Ashby* v. *Bates*[6] that, as the plaintiff had averred the performance of the conditions, it was for him to prove performance, the actual decision being that he had the right to begin. The substance of the new rules on this point was afterwards included in the Common Law Procedure Act, 1852, and is still preserved by R.S.C., Ord. 19, r. 14. In both the cases cited the insurers were repudiating the policies, and they were not concerned with conditions precedent to the liability of the insurers on a valid and existing policy. What I think they decided was that, where on the pleadings the issue was whether there was an existing policy, the plaintiff had to prove it, and prove the performance of conditions necessary to establish it. But I cannot find that these cases have ever been regarded, either in any judgment or in the opinion of eminent text writers, as throwing doubt on what I think is axiomatic in insurance law, that, as it is always for an insurer to prove an exception, so it is for him to prove the breach of a condition which would relieve him from liability in respect of a particular loss.

The respondent's contention no doubt is that, by providing that the observance of conditions is to be a condition precedent to his liability to pay, the policy has shifted the onus on to the claimants. It is enough to say that in this court it appears to me that *Stebbing* v. *Liverpool and London and Globe Insurance Co. Ld.*,[7] concludes the matter. In that case there were words to exactly the same effect as here, namely, that compliance with the conditions should be a condition precedent to any liability on the part of the insurer, and the court decided that the burden of proving the falsity of an answer which amounted to a breach of warranty was on the insurer. It is true that this case also was one concerning a false answer in a proposal, and it may be that an appellate court will some day have to decide whether there is a conflict between the two cases in Meeson & Welsby, which I have cited, and *Stebbing's* case.[7] As those two cases were not in the Exchequer Chamber they are open to review in the Court of Appeal.

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[4] (1604) 8 Co.Rep. 66b.

[5] 14 M. & W. 95.

[6] 15 M. & W. 589.

The arbitrator in the present case has held that the effect of the provision as to the observance of the assured's undertakings is to give them the quality of warranties, so that a breach would absolve the insurer of liability for a loss occurring when the assured was in breach, but that the onus of proof is not affected, and I agree with him. I do not doubt that the parties to a policy can use words which would relieve insurers of the onus and cast it on the assured, as they might with regard to any other matter affecting an insurer's liability: see, for instance, the judgment of Scrutton L.J. in *In re Hooley Hill Rubber and Chemical Co. and Royal Insurance Co.*[8] But, in my opinion, much clearer words than are used here would be necessary to change what I think, certainly for a century and probably for much longer, has always been regarded as a fundamental principle of insurance law, that it is for the insurers who wish to rely on a breach of condition to prove it. I have not thought it necessary to refer to the many other authorities quoted during the argument because, as I have said, I think that *Stebbing's* case[9] concludes the matter in this court, and also because I entirely agree with the clearly expressed conclusions of the arbitrator. I therefore answer the question submitted by saying that the claimants' contention is right, and they must have the costs of the argument and of the special case.

Judgment for the claimants.

Solicitors: *Gouldens; William Charles Crocker.*

J. D. P.

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[7] [1917] 2 K.B. 433; 33 T.L.R. 395.

[8] [1920] 1 K.B. 257, 273; 35 T.L.R. 483.

[9] [1917] 2 K.B. 433.

McCOMBE *v.* READ AND ANOTHER.

[1950 M. No. 2926.]

1955
April 19,
20, 21;
May 9.

Harman J.
(sitting as an
additional
judge of the
Q.B.D.).

Injunction—Nuisance—Trees—Continuing nuisance from roots of trees on adjoining land—Injunction granted.

An injunction will lie to restrain a continuing nuisance to property caused by encroachment by the roots of trees growing on the land of another person.

Dicta in *Butler* v. *Standard Telephones and Cables Ld.* [1940] 1 K.B. 399; 56 T.L.R. 273; [1940] 1 All E.R. 121 and *Middleton* v. *Humphries* (1912) 47 Ir.L.T. 160 applied.

ACTION.

The plaintiff and the defendants owned adjoining leasehold properties. The defendants' property lay to the south of the plaintiff's property; it stood in three-quarters of an acre of land and was bounded on the north by the plaintiff's property.

The plaintiff claimed that roots of trees growing on the defendants' land had encroached on his land and undermined the foundations of his house, and had so withdrawn the moisture underneath the foundations that the clay soil had shrunk and caused considerable damage to his property by settlement. The plaintiff claimed damages and an injunction to restrain the defendants from allowing the continuance of a nuisance and a trespass by the abstraction of water from the plaintiff's land caused by the encroachment of the roots of the trees growing on the defendants' property. (The second defendant, who was a joint holder of the lease with the first defendant, was added at the trial by amendment.)

The defendants did not dispute the fact of the settlement, but contended that this was caused by water in the soil rather than the extraction of water from it; and that the soil, being boulder clay and on a considerable slope, was particularly prone to bring about settlements, and that many of the houses in the immediate neighbourhood had suffered in this way.

Both properties were of long leasehold tenure at nominal rents. The defendants' house appeared to have been built about 1904 and the plaintiff's about 1912.

The boundary between the properties appeared never to have been accurately ascertained and there was no means by which the plans on the documents of title could be reconciled. The boundary was, or had been, marked by a fairly broad band of shrubs. The largest feature near the boundary was a black poplar tree which was growing there before either house was built. This tree was about 20 feet distant from the south-west corner of the plaintiff's house and must have been an old-established tree considerably before 1912. When the plaintiff's house was built the then owner of Highfield House (the defendant's house) decided to screen his boundary from the plaintiff, and with that object he planted a row of Lombardy poplars between six and eight feet from the boundary and a lime tree in the middle somewhere near the boundary line.

Those trees were now over 40 years old, and the plaintiff complained that their roots, growing under the boundary fence, had either undermined the foundations of his house, which at its nearest point was only six feet or so from the boundary, or had so withdrawn the moisture underneath the foundations as to cause the clay soil to shrink.

The plaintiff occupied his property in 1944, and until 1949 had apparently suffered no inconvenience. In that year he noticed several cracks, notably one across an internal wall on the north side of the house, and others in the southern wall of the house nearest the boundary. He had had previous experience of damage caused to property by the roots of poplar trees and he immediately suspected the defendants' trees of being the cause of the trouble. The plaintiff and his wife said that each of them spoke to the first defendant, asking him to come and see the trouble and also to cut down his poplar trees. The defendant's evidence, however, was in conflict with this; he said that the plaintiff's wife never spoke to him on the subject at all, and that when the plaintiff consulted him it was as an architect, asking him to make a survey of his house and to advise him on remedies for its damp condition.

There was a meeting between the parties in September, 1949, at which the first defendant was shown the cracks and he advised the plaintiff to fill them up and do nothing about it. Harman J. found as a fact that the defendant was also asked to cut the trees down and that he gave permission to the plaintiff to cut the roots on his side of the fence but no more. The defendant said that he was only asked to top the trees because they interfered with the plaintiff's greenhouse; he also said that the plaintiff's hall was under water and the floor boards rotted away.

The defendant's attitude being unsatisfactory to the plaintiff, he consulted a builder, one Judd, who inspected the property in September, 1949. His evidence was that he found both exterior and interior walls badly cracked, also ceilings, and that they were cracked both upstairs and downstairs. He dug four inspection pits three feet deep, and he said that there was no trouble with water except from a fractured drain. He found that the soil was very dry and that there were fibrous roots from the nearby poplars under the foundations; the bottom of these foundations were three feet down with 12 inches of concrete, rather more than would be used today. He decided to underpin the whole of the south and part of the west wall.

The plaintiff's solicitors wrote to the first defendant on October 14, 1949, regarding the damage done to the plaintiff's property from the roots of the poplar trees planted on the defendants' land having spread over his land and under the foundations of his house, and gave the defendant notice that the plaintiff claimed damages against him for the nuisance, trespass and wrongful interference with the foundations and support of his premises, which was alleged to be due to the roots of the trees on the defendants' land.

They received no reply, and wrote further on October 27, 1949, saying that while the work was being done or before its completion, facilities for an inspection would willingly be given to the first defendant. The first defendant did not avail himself of the opportunity to view the inspection pits, nor did he deny liability.

In October and November, 1949, Mr. Judd dug a trench all round the south and west fronts of the house, not less than three feet below the concrete foundations, and he asserted that however deep he went, and even to nine feet at the south-west corner, he still found fibrous roots and bigger roots up to one inch in diameter against or under the foundations. The roots of the black poplar were much larger and had gone right under the house. He gave it as his opinion that the considerable movement which he discovered was due to the roots of the Lombardy poplar trees opposite the house and also to the roots of the black poplar. After completing the underpinning Mr. Judd carried out decorative repairs rendered necessary by the settlement and his bill amounted to £678.

The writ in the action was issued on August 12, 1950, and claimed damages to the extent of this bill, and an injunction. The defence, delivered on November 6, 1950, put the whole of the plaintiff's case in issue and did not admit that the black poplar tree was growing on the defendant's property.

Further settlements occurred at the plaintiff's premises in 1952 and 1953. As a result, Mr. Judd was called in during October, 1953, and prepared a specification of further necessary work amounting to £1,032. None of this work had been done, but the plaintiff sought to recover it in this action as general damages.

In 1952 the plaintiff sought advice from one Harold Desch, a forestry expert, who inspected the property three times beginning in May, 1953, and gave it as his opinion that the extent of the internal cracks pointed to the action of tree roots draining moisture from the clay. He stated that the shrinkage bringing about the settlement, being more than five feet six inches down (that was to say, under the foundations as underpinned in 1949) could not be shrinkage due to normal causes. He dug an inspection trench rather more than three feet deep and took samples of roots he found there against the house which proved on analysis to be either poplar or lime. He stated that the roots of poplars normally extend one and a half times the height of the tree.

These trees were between 30 to 40 feet high, and of the nine of them none was more than about 25 feet from the house, while the nearest was about nine feet away. Mr. Desch was emphatic that the damage described to him by Mr. Judd and also the damage which he himself saw was due to tree root action. According to him this was particularly prevalent where the soil was of a boulder clay of this type, more especially on a slope, and the reason of the subsidence was not the action of the tree roots in breaking up or disturbing the foundations but the shrinkage of the clay due to the abstraction of water by the fibrous roots at the end of the trees' range. Mr. Desch said that a poplar tree would transpire 12,000 gallons of water in a season and that these poplars in particular, being in a row, would compete with one another and send their roots straight out before them.

He further said that the roots would grow under any barrier which might be put in the soil. He had met Mr. Judd and had seen his second specification, to which he gave a general approval. He said that the black poplar was the smallest cause of the damage, because, established before the house was built, it probably took its water from beyond the house foundations.

Mr. Desch was not cross-examined in any detail on the characteristics of the neighbourhood. It was suggested to him that the foundations were waterlogged and that there had been an underpinning of the house within a few years of its construction. No evidence which was accepted was subsequently given on either of these points.

The defendants' answer to the case was, as to the black poplar, that it was really on the plaintiff's side of the boundary and that he was not responsible for it, and, as to the Lombardy poplars, that the evidence that they were the cause of the trouble was mere guesswork, and that in this neighbourhood houses frequently subsided without any trees to assist the process.

The first defendant himself made a number of statements to the effect that all the houses in this road and the whole estate on the other side of the hill had been underpinned. He further alleged that about 75 per cent. of the houses in the neighbourhood were either coming down or had been underpinned and that the cause of the fall was the saturation of the clay. Harman J. refused to accept any of this evidence of the first defendant, who had declined to inspect the foundations when offered the opportunity.

Evidence for the defendants was given by two persons practising locally as architects. The first of these had merely been concerned to try to ascertain the boundary between the properties and the exact position of the trees. He said that it was never within his province to look at the plaintiff's house and he was unwilling to express a view about it; but, practising in the neighbourhood, he had had experience of settlements in a number of houses in the district which had had to be underpinned.

Evidence was also given by Mr. Reeves, a chartered architect, who had lived for the last 20 years in the vicinity. He said that the whole of the hill was very much subject to settlement and that in his view the less burrowing that was done the better, and that the further settlement of 1953 was brought about by the underpinning of 1949. He said that at least four houses in the road had slipped and that another house in the vicinity had also at one time been so unstable that 12 years ago it was condemned. He added that it was now perfectly sound. He agreed that tree roots might have contributed to the result, but did not think they were the main cause. Cross-examined, he agreed that tree roots might cause shrinkage of the clay below the foundations, but he added that the house opposite had settled without any trees. He said that this hill was full of springs, and that in his view underpinning was no cure for soil movement.

The defendants' case as to the black poplar was that if the boundary between the two properties were drawn straight, as the plans showed, the tree would be north of the line. It was, however, proved that since at least as far back as 1927 the tree had been treated as being on the defendants' property, and Harman J. found that they must be treated as responsible for this tree.

S. O. Olson for the plaintiff. The evidence clearly establishes that the subsidence was due to the roots of the defendants' trees; that constitutes a continuing nuisance. It is well established that a nuisance due to overhanging branches or roots of trees may be abated without notice: *Lemmon* v. *Webb.*[1] Abatement is not the only remedy open to the plaintiff, and an action on the case will lie: *Smith* v. *Giddy*[2] and *Lemmon* v. *Webb*,[3] *per* Kay L.J. Damages alone are not an adequate remedy; this is a continuing wrong, and the plaintiff would be obliged to come back to court from time to time as further damage occurred. That would impose an unfair burden on the plaintiff, and as a matter of convenience he should be granted an injunction against the defendants to restrain the continuance of the nuisance.

There appears to be no English case where an injunction has been granted in such circumstances, but Lewis J., obiter, in *Butler* v. *Standard Telephones and Cables Ld.*,[4] approved the granting of an injunction in *Middleton* v. *Humphries*,[5] an Irish case. The dicta of Lewis J. should be followed and an injunction granted. The plaintiff is also entitled to damages as compensation for the expense he has incurred.

H. G. Garland for the defendants. It is not established on the facts that the defendants' trees caused the subsidence. According to the defendants' evidence it was due to the nature of the soil, and the plaintiff adopted the wrong treatment by underpinning, which aggravated the subsidence. *Butler* v. *Standard Telephones and Cables Ld.*[6] is an accurate statement of the law; but no injunction or damages should be granted here as the plaintiff has not proved that the damage was caused by the roots of the defendants' trees.

Cur. adv. vult.

May 9. Harman J., reading his judgment, after stating the facts: In this state of the evidence, does the plaintiff prove his case? In my judgment he does. I have on the one hand evidence of two persons, one an experienced builder and the other a man who has made a special study of the subject, and both of whom made a careful examination of the locus in quo, that the cause of the subsidence of the plaintiff's house is the exhaustion of water from the boulder clay by the roots of the trees growing on the defendants' property. On the other hand, I have testimony from persons with wide local experience who assert that owing to local conditions houses are very prone to subsidence in this immediate area. In addition, one of them advanced the opinion that, though the trees might have contributed, the soil (that is to say, the nature of it, I suppose) was the main cause of the trouble. It is to be observed that neither of these people had examined the plaintiff's property, and that the first defendant, though given an opportunity to do so, did not by himself or any of his advisers take advantage of the opening up of the ground, and he has no one but himself to blame that the evidence about the state of things immediately round and under the plaintiff's house is all one side.

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[1] [1894] 3 Ch. 1; 10 T.L.R. 467.

[2] [1904] 2 K.B. 448; 20 T.L.R. 596.

[3] [1894] 3 Ch. 24.

[4] [1940] 1 K.B. 399; 56 T.L.R. 273; [1940] 1 All E.R. 121.

[5] (1912) 47 Ir.L.T. 160.

[6] [1940] 1 K.B. 399.

In my judgment, I must prefer the evidence for the plaintiff. This house had apparently not proved unstable for 35 years and it would, in my judgment, be fanciful to reject as a cause of the trouble the impact of the roots of these poplars. This, after all, is a well-known source of trouble where houses are built on a clay soil. Accordingly, in my judgment, the plaintiff proves his case. To what remedy is he entitled?

It is very old law that if my neighbour's trees encroach on my ground, either by overhanging boughs or by undermining roots, I may cut the boughs or the roots so far as they are on my side of the boundary. In *Lemmon* v. *Webb* [1] it was pointed out in the Court of Appeal that this kind of encroachment is not a trespass which may ripen into a right in the course of time, but is a nuisance which raises a cause of action only on proof of damage. Moreover, the case decides that the nuisance may be abated without notice.

Following on this, a Divisional Court in *Smith* v. *Giddy* [2] granted a new trial where a county court judge had held that the only remedy of an adjoining landowner was to lop the trees and that an action on the case would not lie. It is clear, therefore, that an action for damages will lie in these circumstances but there appears to be no English decision where an injunction has been granted.

In a recent case, *Butler* v. *Standard Telephones and Cables Ld.*,[3] the plaintiffs claimed damages for the abstraction of water from under their houses by the roots of poplar trees and were held entitled to them. It is, however, noticeable that in that action the plaintiffs claimed an injunction but apparently abandoned that part of the claim at the trial. Lewis J., though, in his judgment, mentioned with approval the case of *Middleton* v. *Humphries*,[4] where the Chancery judge in Ireland apparently had no doubt that an injunction could be granted.

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[1] [1894] 3 Ch. 1; 10 T.L.R. 467.

[2] [1904] 2 K.B. 448; 20 T.L.R. 596.

[3] [1940] 1 K.B. 399; 56 T.L.R. 273; [1940] 1 All E.R. 121.

In my opinion this must be right. If an action on the case will lie, then the remedy of injunction must be available if the nuisance be a continuing one, as is clearly the case here. It could not be right to throw upon the plaintiff the burden of watching for further subterranean encroachment. In my judgment, however, the plaintiff is not entitled to an unqualified injunction, for he has no remedy unless a nuisance be caused. The injunction will therefore be to restrain the defendants from allowing the roots from any tree on their property so to encroach on the plaintiff's land as to cause a nuisance.

There remains the question of damages. The defendants were willing to submit, if wrong in law, to judgment for the amount claimed as special damage, namely, £678 1s. 0d. The plaintiff, however, seeks to recover in respect of damage discovered on the 1952 and 1953 inspections and which has occurred since the issue of the writ. If this be new damage he cannot do that, but if it be continuing damage from the same nuisance then he can claim the damage accruing up to the date of judgment.

On the evidence I am of opinion that the damage is all one. It is true that the builder in 1950 dug a trench round the house five feet deep and cut off the ends of the roots which he found, but the exhaustion of water from the clay soil underlying the house would continue as the evidence shows and the further subsidence would result from that. There is, however, a doubt introduced by the evidence of Mr. Reeves who, with his wide local experience, suggested that the underpinning done in 1950 was the wrong treatment and that this may have caused or at least contributed to the further settlement.

I am, therefore, not in a position to say that the defendants must be liable for the whole aggregate damage and I put the plaintiff to his election either to have judgment now for the sum specified in his claim or to take an inquiry as to damage which in this division, I suppose, will be referred to an official referee. On that inquiry it will be open to the defendants to suggest that at any rate part of the damage was caused by ill-judged operations in 1950. I do not find that that was so, but am of opinion that it is a consideration still open to the defendants to put forward.

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[4] (1912) 47 Ir.L.T. 160.

There will be an injunction to restrain the defendants by themselves, their servants or agents from causing or permitting the roots of trees growing on their property to encroach on the property of the plaintiff so as to cause a nuisance.

[After discussion, Harman J. ordered an inquiry as against the first defendant only as to the whole of the damage caused by the nuisance, the costs of which were reserved.]

Judgment for the plaintiff; injunction granted against both defendants; inquiry as to damage ordered against the first defendant.

Solicitors: *Goldingham, Wellington & Co. for Granville Jones & Co., Barnet; Vanderpump & Sykes.*

I. G. R. M.

DENHAM *v.* MIDLAND EMPLOYERS MUTUAL ASSURANCE LD.

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May 13, 16, 17, 18, 26.

Denning, Birkett and Romer L.JJ.

Insurance—Employers' liability—"Contract of service"—Unskilled labourer lent by his employer to assured—Death due to negligence of assured's servants—Labourer not "under a contract of service" with assured.

Master and Servant—Employment of servant of another. "Contract "of service."

An employer engaged L. G. Ld., boring and pump engineers, to do certain work on his land, and he provided one of his own unskilled labourers to help with the work. The labourer continued to be paid by his employer, who alone had power to dismiss him and who kept his National Health Insurance card; but he worked alongside L. G. Ld.'s skilled employees and under the specific direction of that company's foreman. The labourer was killed in circumstances making L. G. Ld. liable to pay damages to his widow on the ground that his death was due to the company's negligence or that of its servants. L. G. Ld. were covered by (1) an employers' liability policy covering liability to "any person "under a contract of service . . . with the insured"; (2) a public liability policy excluding the liability mentioned in (1):—

Held, that, although L. G. Ld. would have been liable as a temporary employer for injury to a third person by the negligence

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of the labourer in the course of his work, and similarly L. G. Ld. were liable to his widow in the present case, the labourer's contract of service was with his original employer alone; that it was only the use and benefit of his services which had been transferred to L. G. Ld.; and that such a transfer did not render him "a person "under a contract of service" with L. G. Ld. within the meaning of the employers' liability policy, but that they were entitled to recover under the public liability policy.

Decision of Lord Goddard C.J. affirmed.

Appeal from Lord Goddard C.J.

In August, 1953, Eastwoods Ld., a company of brickmakers owning property at Woburn Sands, Hertfordshire, employed Le Grand Sutcliff and Gell Ld., contractors (hereinafter referred to as Le Grands) who specialized in boring holes in the ground, to make test borings on their property. Le Grands agreed to provide two skilled drillers with plant and tackle to carry out the test borings at a stated price and Eastwoods agreed to provide one labourer to assist the skilled men, free of charge to Le Grands, an arrangement which was quite usual between the two companies. If Eastwoods had not provided the unskilled labour, it would have been obtained by Le Grands from the local labour exchange. Eastwoods Ld. lent a man named Clegg to do the unskilled work, and a few days later he was killed in circumstances in which it was agreed that Le Grands were liable to pay damages to his widow on the ground that his death was due to the negligence of Le Grands or their servants. Le Grands sought to be indemnified by their insurers against their liability to the widow. They were covered by two policies, one with the Midland Employers Mutual Assurance Ld. in respect of their liability to their employees and one with Lloyd's in respect of their liability to the public.

The question which of the insurers was liable to indemnify Le Grands, having regard to the terms of the two policies, was submitted to arbitration, and the arbitrator stated his award in the form of a special case from which the following facts appeared. The employers' liability policy issued by the Midland Employers Mutual Assurance Ld. stated that: "If any person "under a contract of service or apprenticeship with the insured "shall sustain any personal injury by accident or disease caused "during the period of employment and arising out of or in the "course of his employment by the insured . . . and if the "insured shall be liable to pay damage for such injury or disease "the Association shall indemnify the insured against all sums "for which the insured shall be so liable." The public liability policy stated that the Lloyd's underwriters would "indemnify the "assured for any sums which they may become legally liable to "pay in respect of: 1. Death or accidental bodily injury to "persons; 2. Loss of or damage to property, arising in or out "of the business of boring and pump engineers carried on by "Le Grand Sutcliff and Gell Ld. anywhere in the United "Kingdom and Ireland including Eire. Exclusions. This policy "does not cover: 1. Liability for death of or bodily injury to any "person under a contract of service or apprenticeship with Le "Grand Sutcliff and Gell Ld. where such death or injury arises "out of and in the course of his employment by Le Grand "Sutcliff and Gell Ld."

The arbitrator stated the relevant facts in regard to Clegg's work as follows: "On the evidence called before me I find as "facts that a few days prior to September 30, 1953, Clegg was "lent by Eastwoods to Le Grands for the said purpose; that it "was the practice of Le Grands, if no labourer was lent to them, "to employ one obtained from the local labour exchange; that "the labourer's work was unskilled; that Clegg himself had no "previous experience at that work; that the actual manual work "which he was required to do consisted of all sorts of rough "work and odd jobs and included handling a rope in connexion "with the erection of the rig for the purpose of putting it on a "drum; that he did this under the specific direction of one Gale, "a foreman employed by Le Grands; that he had to comply "with any proper orders given by such foreman; worked the "same hours as those of Le Grands' general employees on the "site including overtime. I also find as facts that he was paid "his wages by Eastwoods; that they alone had the power to "dismiss him; that they kept his National Health Insurance card, "but apart from the occasional presence of one Crosby on the "site of the work no other employee of Eastwoods was present "on the site at any material time, nor gave any directions to "Clegg directly or indirectly. . . . On the said facts I draw "the inference that the only practical way in which his services "were or could have been employed at that site were such that "whenever it was necessary to instruct him what to do or how "to do what he was required to do he would have to obey the "instructions of the foreman Gale and that that was recognized "by Le Grands, by Eastwoods and by Clegg himself."

The arbitrator found that Clegg was under a contract of employment with Le Grands and that they were therefore entitled

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to be indemnified under the employers' liability policy. He stated his award in the form of a special case which came before Lord Goddard C.J., who reversed the decision of the arbitrator. He was of opinion that no contract of employment existed between Clegg and Le Grands, and consequently that they were entitled to be indemnified by Lloyd's under the terms of their policy.

Lloyd's underwriters appealed.

Patrick O'Connor and *Martin McLaren* for the appellant. Lord Goddard C.J. was wrong in holding that the responsibility in this case fell on Lloyd's underwriters under the terms of the policy taken out with them. Employers of labour in this country usually carry two forms of insurance, (1) an employers' liability policy, which used to give cover in respect of liability under the Workmen's Compensation Act and the Employers' Liability Acts and now covers claims at common law made by persons under a contract of service or apprenticeship, and (2) a public liability insurance covering liability to third parties such as invitees and the like. The problem in the present instance relates to a case where a servant has been lent by one employer to another, and the question is whether Clegg was a servant of Le Grands at the time he was killed, or continued in the service of his original employers; and there is also the further question whether it is possible for a man to be genuinely a servant and yet not be under a contract of service in the relationship of master and servant. It is contended that the claim here relates to a man under a contract of service and consequently that Lloyd's underwriters' public liability policy is not on risk and that the respondents' policy covering employers' liability is the one on which Le Grands must rely.

[DENNING L.J. You say that Clegg was a servant of Le Grands and under a contract of service with them?]

Yes. Once one finds the relationship of master and servant there is a prima facie case of a contract of service between the parties. The principal test whether that relationship exists is whether the master controls the servant, and to establish control it must be shown that the master has the right to tell the servant not only *what* to do but also *how* to do it: *Century Insurance Co. Ld.* v. *Northern Ireland Road Transport Board* [1]; *Mersey Docks and Harbour Board* v. *Coggins & Griffith (Liverpool) Ld.* [2]; *Garrard*

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[1] [1942] A.C. 509; [1942] 1 All E.R. 491.

[2] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.

v. *A. E. Southey & Co.*,[3] and Batt, Law of Master and Servant, p. 16. It is next submitted that once the relationship of master and servant is found to exist, there is a contract of service, because the relationship of master and servant cannot arise save contractually: see *Holdman* v. *Hamlyn*[4] and also the definitions of "Workman" and "Employer" in the Workmen's Compensation Act, 1925, ss. 3 (1) and 5 (1).

In the court below Lord Goddard C.J. asked what was the consideration for the contract in the case of a lent servant, and he was informed that on the one side it was the provision of the work by the temporary employer and, on the other, the doing of the work by the lent servant. Once the employment by Le Grands is held to be contractual the case comes within the direct words of the public liability policy excluding liability "for death "of or bodily injury to any person under a contract of service "with Le Grand Sutcliff and Gell Ld." The root problem is what was the relationship existing between Clegg and Le Grands at the time of the accident? It was held by Lord Goddard C.J., and is contended by the respondents, that Clegg was not a servant but was acting in some other capacity. But Le Grands owed certain duties to Clegg, such as a master would owe to his servant. Those duties are an integral part of the relationship of master and servant and do not arise if that relationship does not exist: *London Graving Dock Co. Ld.* v. *Horton*[5] and *Smith* v. *Baker & Sons.*[6] There may be a concurrent contract of employment with two masters, but that does not involve or permit that more than one master should be vicariously liable for the act of his servant at one particular time. The contract between Clegg and Le Grands was one terminable at will without notice, and the evidence of the existence of the contract was the fact that Clegg went to Le Grands and worked for them. It is conceded that a transfer of a man from one employer to another cannot take place without his consent, but such consent may be inferred from his conduct and should be so inferred in the present case.

The arbitrator was right in holding that Clegg was under a contract of service with Le Grands within the meaning of the employers' liability policy and was therefore excluded from cover under the Lloyd's policy. [Reference was also made to *Woolfall*

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[3] [1952] 2 Q.B. 174; [1952] 1 T.L.R. 630; [1952] 1 All E.R. 597.

[4] [1943] K.B. 664; [1943] 2 All E.R. 137.

[5] [1951] A.C. 737, 746; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[6] [1891] A.C. 325, 362; 7 T.L.R. 679.

Rimmer Ld. v. *Moÿle*[7]; *Etchells, Congdon & Muir Ld.* v. *Eagle Star and British Dominions Assurance Co. Ld.*[8]; Halsbury's Laws of England, 2nd ed., vol. 22, paras. 112 and 119, and p. 120, para. 201; Salmond on Torts, 11th ed., p. 102, and 64 Law Quarterly Review, p. 181.]

Marven Everett Q.C. and *H. Tudor Evans* for the respondents. Lord Goddard C.J. was right in his decision and Le Grands are not entitled to be indemnified under the terms of their policy with the respondents. It does not follow necessarily that Le Grands are entitled to indemnity under the terms of their policy with Lloyd's underwriters. The question is as to the true construction of the policy of insurance issued by the respondents. The real point is not what constitutes a person a servant at common law or what may or may not involve questions of vicarious responsibility, but what is the meaning of the language employed in this particular policy of insurance. The arbitrator dealt with the subsidiary questions whether there was a transfer of the man to a temporary employer and, if so, was a contract of service created? In *Moore* v. *Palmer*[9] Bowen L.J. said that in such a case the test was "whether the servant was transferred or only the use and benefit of his work?" See, also, *Chowdhary and Another* v. *Gillot*[10] and *Holt* v. *Rhodes (W. H.) & Son Ld.*[11]

Those decisions clearly indicate that a duty equivalent to that existing between master and servant may spring up by reason of proximity and that there is no difficulty in the workman being given proper protection when it is only the use and benefit of his services which are transferred, without the creation of a contract of service. Moreover, the transfer of the use and benefit of a man's services may give rise to vicarious responsibility in the borrower vis-à-vis third parties and yet there may be no contract of service between the man and the borrower. In the present case it is clear that it was only the use and benefit of Clegg's services which had been transferred to Le Grands. His contract of service was still with Eastwoods. Workmen cannot be transferred from one employment to another so as to affect their contractual rights and obligations without their consent, express or implied: see *per* Lord Porter in *Mersey Docks and Harbour Board* v. *Coggins & Griffith (Liverpool) Ld.*[12] For instance, a break in a contract of service may have serious effects on a pensions or group life scheme of which the workman was a member. Eastwoods alone selected Clegg and paid him and held and stamped his insurance cards, and alone could suspend or dismiss him. He was never asked to agree to, nor was there proper evidence of, a transfer to Le Grands' service, and Clegg was never a "person under a contract of service with" Le Grands and was not therefore within the exclusion in the Lloyd's policy nor covered by the policy issued by the respondents. [*Laugher* v. *Pointer*,[13] *Willard* v. *Whiteley Ld.*[14] and *Ormrod* v. *Crosville Motor Services Ld.*[15] were also referred to.]

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[7] [1942] 1 K.B. 66; 58 T.L.R. 28; [1941] 3 All E.R. 304.

[8] (1928) 72 S.J. 242.

[9] (1886) 2 T.L.R. 781, 782.

[10] (1947) 63 T.L.R. 569; [1947] 2 All E.R. 541.

[11] [1949] 1 All E.R. 478.

[12] [1947] A.C. 1, 15.

Patrick O'Connor replied.

Cur. adv. vult.

May 26. The following judgments were read.

DENNING L.J. stated the facts substantially as set out above and continued: On reading the two policies it is plain that the question is whether Clegg was employed "under a contract of service" with Le Grands. If he was so employed the Midland company is liable to indemnify Le Grands. If he was not so employed, Lloyd's underwriters are liable. The difficulty of the case is shown by the fact that the arbitrator—for whose opinion we all have the most sincere respect—found one way and Lord Goddard C.J. has found the other way. I find myself in agreement with the decision of the Lord Chief Justice.

Much of the difficulty which surrounds this subject arises out of the nineteenth century conception that a servant of a general employer may be transferred to a temporary employer so as to become for the time being the servant of the temporary employer. That conception is a very useful device to put liability on the shoulders of the one who should properly bear it, but it does not affect the contract of service itself. No contract of service can be transferred from one employer to another without the servant's consent: and this consent is not to be raised by operation of law but only by the real consent in fact of the man, express or implied: see *Nokes* v. *Doncaster Amalgamated Collieries Ld.*[1] In none of the transfer cases which have been cited to us had the consent of the man been sought or obtained. The general employer has simply told him to go and do some particular work for the temporary employer and he has gone. The supposed transfer, when it takes place, is nothing more than a device—a very convenient and just device, mark you—to put liability on to the temporary employer; and even this device has in recent years been very much restricted in its operation. It only applies when the servant is transferred so completely that the temporary employer has the right to dictate, not only *what* the servant is to do, but also *how* he is to do it: see *Mersey Docks and Harbour Board* v. *Coggins & Griffith (Liverpool) Ld.*[2] Such a transfer rarely takes place, if ever, when a man is lent with a machine, such as a crane or a lorry: nor when a skilled man is lent so as to exercise his skill for the temporary employer. In such case the parties do not contemplate that the temporary employer shall tell the man how to manipulate his machine or to exercise his skill. But a transfer does sometimes take place in the case when an unskilled man is lent to help with labouring work: see *Garrard* v. *A. E. Southey & Co.*[3] The temporary employer can then no doubt tell the labourer how he is to do the job. The labourer becomes so much part of the organization to which he is seconded that the temporary employer is responsible for him and to him.

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[13] (1826) 5 B. & C. 547.

[14] [1938] 3 All E.R. 779.

[15] [1953] 1 W.L.R. 1120; [1953] 2 All E.R. 753.

[1] [1940] A.C. 1014.

Applying these principles to the facts found by the arbitrator, I have myself no doubt that if a third person had been injured by the negligence of Clegg in the course of his work, then Le Grands and not Eastwoods would be liable to the third person. So, also, when Clegg himself was killed Le Grands are liable to his widow on the same footing as if they were his masters and not merely as invitors. These results are achieved in law by holding that Clegg became for the time being the temporary servant of Le Grands. There is no harm in thus describing him so long as it is remembered that it is a device designed to cast liability on the temporary employer. The real basis of the liability is, however, simply this: if a temporary employer has the right to control the manner in which a labourer does his work, so as to be able to tell him the right way or the wrong way to do it, then he should be responsible when he does it in the wrong way as well as in the right way. The right of control carries with it the burden of responsibility. So, also, if a temporary employer sets a labourer to work alongside his own skilled men he should take just as much care to see that the plant and material are safe for the labourer as for the skilled men. The labourer should not be defeated by knowledge of the danger any more than the skilled men.

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[2] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.

[3] [1952] 2 Q.B. 174; [1952] 1 T.L.R. 630; [1952] 1 All E.R. 597.

I cannot regard the propositions about "temporary servant" and "temporary employer" as decisive of the questions now before us. We have to decide simply whether, on the wording of the employers' liability policy, Clegg was employed "under "a contract of service" with Le Grands. I do not think that he was. His contract of service was with Eastwoods and Eastwoods alone. They selected him. They paid him. They alone could suspend or dismiss him. They kept his insurance cards and paid for his insurance stamps. He was never asked to consent to a transfer of the contract of service and he never did so. If he was not paid his wages, or if he was wrongfully dismissed from the work, he could sue Eastwoods for breach of contract and no one else. If he failed to turn up for work Eastwoods alone could sue him. I see no trace of a contract of service with Le Grands except the artificial transfer raised by the law so as to make Le Grands liable to others for his faults or liable to him for their own faults; and I do not think the artificial transfer so raised is "a contract of service" within this policy of assurance. There was no contract of service between Clegg and Le Grands. Le Grands are, therefore, not entitled to recover against the Midland Employers Mutual Assurance Company under the employers' liability policy, but only against Lloyd's under the public liability policy. This view is confirmed by the fact that the premium on the employers' liability policy is regulated by the "amount of wages and salaries and "other earnings paid to employees by the insured" during the period of insurance. The premium is, therefore, paid to cover the risk of injury to men on the pay roll of Le Grands, and not to men on the pay roll of anyone else. It is also confirmed by the fact that Eastwoods would be the employer of Clegg for the purposes of the Workmen's Compensation Acts (see section 5 of the Act of 1925).

I would dismiss this appeal.

BIRKETT L.J. I agree with the judgment which has just been delivered by my Lord. I have had the opportunity of reading in advance and considering the judgment of Romer L.J., with which I agree and which I am about to read. In those circumstances I do not propose to deliver a judgment of my own, agreeing, as I do, with my Lord and Romer L.J.

ROMER L.J. (read by Birkett L.J.). Notwithstanding the persuasive and able argument which Mr. O'Connor addressed to

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us on behalf of the appellants I am of opinion that Lord Goddard C.J. came to a right conclusion in this case.

The question, as it seems to me, is a short one and may be stated thus: At the time when the workman, Clegg, met with his accident was he, on the facts as found by the arbitrator, a person under a contract of service with Le Grand Sutcliff & Gell Ld. within the contemplation of the policy which the respondents issued to Le Grands? If he was, then the respondents are liable under the policy; if he was not, then no liability attaches to them. Immediately before he went to work for Le Grands, Clegg was working under a contract of service with Eastwoods, and in my judgment he was still performing his obligations under that contract at the time when he met his death. If it be said, as it is said, that when he started to work for Le Grands he entered into a new contract of service with that company, one is entitled and bound to inquire what the terms of that contract were. Among the common features of a service contract are an obligation by the employer to employ a man, and to pay him an agreed or proper wage, and a right to control his services and the manner in which he performs them, and to dismiss him if reasonable cause is shown; and, on the workman's side, he must obey all reasonable directions, present himself for work at an agreed hour, and continue to work for the agreed period, and will be guilty of breach of contract if he refuses to perform these obligations. In my opinion the only one of the features which I have mentioned which was present in the association which existed between Clegg and Le Grands was that he had to perform the tasks which were allotted to him in whatever way Le Grands told him to perform them. None of the other features was present. Le Grands were under no duty to him to give him employment nor to pay him, nor could they dismiss him. On the other hand, Clegg was under no duty to Le Grands to work for them for any agreed hours or at all and could not have been sued by them for breach of contract if he stayed at home instead of reporting for work. Further, the inference which I draw from the arbitrator's findings is that the reason why he subjected himself to the control of Le Grands as to what he did and how he did it was that Eastwoods told him to do so.

It appears to me, accordingly, that not even the skeleton of a service contract has been established as between Clegg and Le

Grands. There is no evidence that either Le Grands or Clegg at any time agreed to enter into such a contract, and the relationship of master and servant cannot be established except by mutual consent. If Le Grands were intending to incur the obligations of an employer, they would presumably have reserved also the corresponding right to dismiss; whilst Clegg would hardly bind himself to work for Le Grands without securing the right to receive a wage. Yet the right to dismiss was at all times vested in Eastwoods, and it was to them alone that Clegg was entitled to look for his wages. When to this is added the fact that Eastwoods kept his National Insurance card, it is difficult indeed to accept the view that Clegg entered into a service contract with Le Grands in substitution for, or, (if such a thing were possible), concurrently with that which already existed between himself and Eastwoods. There is a clearly marked distinction between the transfer of a servant on the one hand and the transfer only of his services on the other. "The great test," said Bowen L.J. in *Moore* v. *Palmer*,[4] "was this—whether the servant was transferred or only the use and benefit of his work." The facts of the present case show clearly, in my judgment, that as between Clegg and Eastwoods and Le Grands, all that was transferred to Le Grands was the use and benefit of Clegg's work; and the fact that Le Grands were to be entitled to control that work (which, it is to be observed, was work done on Eastwoods' premises and for their purposes) cannot in itself establish a new contract of service which was not within the contemplation of any of the parties concerned. It is true, as Denning L.J. has pointed out, that for some purposes Le Grands undoubtedly assumed the obligations and liabilities of a master in relation to Clegg; for example, they would have been answerable to a third party who was injured as a result of Clegg's negligence while working for them. This consideration does not, however, in my opinion, affect the real issue in this case, which is whether Clegg at the time of his death was a person under a contract of service with Le Grands, within the meaning of that phrase as used in the policy. In my judgment he was not, and I am fortified in this conclusion by the fact that by paragraph 5 of the conditions attached to the policy, the annual premium payable to the insurers was measured by reference to the wages paid by

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[4] (1886) 2 T.L.R. 781, 782.

Le Grands to their employees, which is some indication that the contracts of service envisaged by the policy were contracts of the ordinary kind which exist between master and servant and possessing the features to which I have earlier referred.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Hewitt, Woollacott & Chown; Machin & Co.*

P. B. D.

C. A.
1955
June 11, 14, 29.

Denning, Birkett and Romer L.JJ.

SOUTH DEVON WATER BOARD *v.* GIBSON.

[Plaint No. L. 2.]

Rates and Rating—Water rate—Right to charge—"Undertakers who "supply water to any premises"—Villagers with immemorial right to free water from public standpipes—Gratuitous supply vested in water authority—Provision of mains and pipes for connecting up premises with free supply—Meaning of "supply"—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 56, 64—*Water Act*, 1945 (8 *&* 9 *Geo.* 6, *c.* 42), *Sch.* 3, *s.* 46.

Section 46 of the Third Schedule to the Water Act, 1945, empowers water authorities which "supply water to any premises" to charge a water rate.

The inhabitants of a village had from time immemorial enjoyed the right to take from three public standpipes in the village street water emanating from a drowned mine shaft conveyed by a main pipe to the standpipes. In 1875, that water system vested in the local authority by virtue of section 64 of the Public Health Act, 1875, as "existing . . . conduits . . . and works . . . for . . . the "gratuitous supply of water to the inhabitants"; and in 1912 the local authority acquired by agreement with a landowner such further rights as were needed to enable them to construct other works, including a new main laid to the public standpipes. In 1920, the owners of certain cottages in the village were permitted by the local authority to lay a pipe to connect up the cottages with the main, and later the premises of other inhabitants, including the defendant, were connected up with the main. In 1950, the water undertaking vested in the plaintiff water board, which sought to levy a water rate on the defendant for the supply to his premises:—

Held, that the delivery of water to the inhabitants' premises through pipes and mains provided by the board was a "supplying" of water within the meaning of section 46 of the Third Schedule to the Water Act, 1945, and the board were therefore entitled to

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1955

SOUTH DEVON WATER BOARD v. GIBSON.

charge a water rate in respect of that supply, for the right of the inhabitants to free water under section 64 of the Public Health Act, 1875 (and under section 124 of the Public Health Act, 1936, which replaced it), was limited to taking and carrying away free water from the public standpipes.

APPEAL from Judge Pratt sitting at Newton Abbot County Court.

Before 1912 the villagers of Holne, in Devon, obtained water from the Ringleshute Mine down an artificial open leat from which water was collected in a tank at Playcross. From the tank at Playcross there was a two-inch main running along the village street to three public standpipes connected with the main. There were no private pipes connected with the two-inch main.

In 1875, that water system vested in the Totnes Rural District Council by virtue of section 64 of the Public Health Act, 1875,[1] which by section 56 was empowered to charge a water rate in respect of the supply of water to any premises. Section 56 of the Act of 1875 was replaced by section 46 of the Third Schedule to the Water Act, 1945, which provides that "Undertakers who "supply water to any premises for domestic purposes may charge "in respect thereof a water rate . . ." and which was incorporated in the South Devon Water Order, 1950.

By a deed dated January 5, 1912, made between Richard Dawson of the one part, and the Totnes Rural District Council of the other part, it was recited, inter alia, that the inhabitants of Holne had from time immemorial enjoyed the use gratuitously of the water hereinbefore referred to, that "Ringleshute mine "shaft and Holne Town leat are stated to be vested in (the rural "district council) for the purpose of supplying Holne with pot "water," that certain pollution had occurred, and that with a view to obviating it the rural district council had submitted a scheme for laying a new water main, and that the local government board had approved the scheme but had suggested that a formal agreement should be entered into with Dawson "for the "acquisition of such water rights (if any) as may be necessary in "addition to those already vested in" the rural district council. By the operative part of the deed Dawson granted to the rural district council, first, the liberty and right of laying mains or pipes for carrying and conducting water for the benefit of the inhabitants of the village of Holne under certain lands of Dawson, and secondly, "the liberty and right (if and so far as the grantees "do not already possess the same and as the grantor has power "to grant the same) of carrying water in by and through the "mains and pipes aforesaid in such directions as the grantees "may decide for the purpose of supplying water for domestic "purposes to the inhabitants of Holne village and of inspecting "maintaining cleansing repairing renewing and enlarging such "pipes valves manholes and surface boxes as aforesaid and taking "by means of such pipes water from the said Ringleshute shaft "and stream."

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[1] Public Health Act, 1875, s. 56: "Where a local authority supply "water to any premises they may "charge in respect of such supply a "water rate to be assessed on the net "annual value of the premises . . ."

S. 64; "All existing public cisterns "pumps wells reservoirs conduits "aqueducts and works used for the "gratuitous supply of water to the "inhabitants of the district of any "local authority shall vest in and be "under the control of such authority, "and such authority may cause the "same to be maintained and plentifully supplied with pure and wholesome water, or may substitute "maintain and plentifully supply "with pure and wholesome water "other such works equally convenient; they may also (subject "to the provisions of this Act) construct any other such works for "supplying water for the gratuitous "use of any inhabitants who choose "to carry the same away, not for "sale, but for their own private "use."

Following the execution of that deed, the rural district council constructed a three-inch main in substitution for the lower part of the open leat, into which the water was taken by means of a tank and filter. At the same time, the tank at Playcross was disused and there was laid in substitution for the two-inch main a three-inch main to which the three public standpipes were connected.

In 1920, the Dawson Trustees, who owned a row of cottages in the village, having obtained the permission of the local authority, connected up the cottages with the three-inch main. In 1926, the defendant's predecessor in title, without obtaining the permission of the rural district council, laid a pipe at his own expense to connect with the pipe which had been laid by the Dawson Trustees.

In 1950 the plaintiffs, the South Devon Water Board, took over the water undertaking from the Totnes Rural District Council; and by a summons issued on January 6, 1955, against the defendant, Cuthbert C. Gibson, as the owner and occupier of premises in the parish, claimed that as at all material times they had provided to his premises a supply of water for domestic purposes and also for agricultural purposes, he was liable to pay a water rate in respect of such supplies. The defendant, while admitting that the board were authorized undertakers, did not admit that they provided a supply of water to his premises, and claimed that as he was an inhabitant of the parish, and the water used by him at his premises was taken from a public conduit and other works used for the gratuitous supply of water to the inhabitants of the parish, he was not liable to pay the water rates claimed.

At the hearing in the county court, the board did not dispute that, prior to 1875, the villagers were entitled to a free supply of water from the standpipes, this being a right which had been enjoyed from time immemorial which could not be affected by the vesting of the works in the rural district council, and also conceded that the right to a gratuitous supply of water at the standpipes was still enjoyed by the inhabitants, including the defendant. They contended, however, that as the water from the main was supplied to the defendant's premises, they were "supplying" water to the premises within the meaning of section 46 of the Third Schedule to the Water Act, 1945, and were accordingly entitled to charge a water rate.

The county court judge, on March 17, 1955, gave judgment for the defendant. He said that on the facts and the relevant statutory provisions it could not be said that by permitting the inhabitants to link up service pipes to their main the board was thereby supplying water to the premises. The word "supply" was not defined in any of the Acts, but whatever it might mean it must involve at least (1) bringing water to the consumer, and (2) bringing to him water to which he would not otherwise be entitled. In his view the operations in 1912 did not involve either of those matters on the part of the board's predecessors in title, and the operations in 1920 and in 1926 did not involve the first of them. He held, accordingly, that the board was not entitled to charge a water rate.

The board appealed.

Harold Willis Q.C. and *H. S. Ruttle* for the board. By section 64 of the Public Health Act, 1875, the water "works" were vested in the local authority and the duty placed on them was to see that there was a pure and wholesome supply of water to those works for the gratuitous use of those inhabitants who chose to take it or carry it away; but there is under the section a correlative duty to protect the water. It is not disputed that the villagers have an immemorial right to take water at the standpipes; but when an entirely different set of circumstances is created, namely, the tapping of a main so that water can be taken, not in buckets, but in as great quantities as can pass along the pipes, an entirely different right is being exercised. The main belonged to the local authority at all relevant times since they took water into it and connected it with the standpipes. In 1912 the position of the local authority was strengthened by the agreement; and by putting in the tank, filters, and the new three-inch main, the local authority carried out what were either "substituted works" within section 64, or works which took on the character of the works for which they were substituted. Those works were carried out by agreement, and though the people of the parish paid for the original pipes, they have not paid for maintenance, repair, and so on. The water is brought into the possession of the water authority when it is accumulated in the tank; and the property in the water became vested in the authority, subject to the villagers' right to take it at the standpipes.

Once the local authority began to supply premises through a main connected with a number of service pipes, as well as to the standpipes, they were plainly "supplying" water to the defendant's premises within the meaning of section 56 of the Act of 1875. By the South Devon Water Order, 1950, the works were vested in the board, and the Order incorporated the Third Schedule to the Water Act, 1945, section 46 of which schedule entitled the board in respect of the supply to the defendant's premises to levy water rates or other appropriate charges. If the owner of a pipe in which there is water allows someone else to tap the pipe so that water gets from the pipe to the tapper's premises, the owner of the pipe is plainly "supplying" water to those premises within the meaning of the word "supply" in the relevant Acts. The board has the same charging power as the local authority had under the Act of 1875. The water undertaking only vests in the board because they are "supplying" water. It is a false use of language to suggest, as did the county court judge, that they are not supplying water. The word "supply" was discussed in *West Surrey Water Co.* v. *Guardians of the Chertsey Union*,[2] when North J. said that he understood "supply" to mean "the passing of water from persons who have it to persons "who want it." That is exactly the present position.

The statutory right in the board to levy those charges cannot be displaced unless the villagers can establish that they are entitled in respect of that supply, given in that way, to free water; but there is nothing in the relevant Acts or outside them which can displace the right of the board to levy a water rate.

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[2] [1894] 3 Ch. 513, 516; 10 T.L.R. 581.

G. D. Squibb for the defendant. It is necessary to distinguish supplies of water afforded by statutory water undertakings under the Water Act, 1945, and gratuitous supplies which were placed in the control of the local authority by the Public Health Act, 1875, and now under the control of the board by virtue of the South Devon Water Order, 1950. Statutory undertakings proceeding under the Water Act, 1945, are responsible for initiating the whole scheme. They acquire water and water rights under section 26 of the Act, either by agreement or compulsorily. When they have laid mains, the occupiers of premises are entitled to connect with those mains and to receive a supply of water to their premises on paying the appropriate water rate.

The supply of water in the present case is quite different. No one knows when the supply started; the artificial leat existed at least as long ago as 1809, and the villagers exercised rights from time immemorial to take water. No statutory powers were taken until the coming into force of section 64 of the Public Health Act, 1875, and that which it effected was continued under section 124 of the Public Health Act, 1936. The Act of 1875 vested in the local authority the open leat and the two-inch main running up the village street. In 1912, it is submitted, the local authority, by " substituted works," substituted a lead pipe for a portion of the leat in pursuance of their powers under section 64. The deed of 1912 made no difference whatever to the legal position of the water, which was merely diverted to the three-inch pipe. There is no charging power under section 64, which is self-contained and not tied up with the charging power under section 56, because it is not concerned in any way with the " supply " of " water to any premises " but only with the gratuitous supply of water to inhabitants. The power vested in the local authority by section 64 is to supply the works vested in them with pure and wholesome water. Once the water is in the works it can be taken by the inhabitants as they wish, subject only to the supervisory power of the local authority to see that the inhabitants do not abuse their rights. That is why the Dawson Trustees in 1920 were obliged to get permission from the local authority to take their communication pipes from the main; and if their user had been of an improper nature the local authority could have stopped them under their general power of control. Nothing in the Acts or events subsequent to the Act of 1875 takes away the right of the inhabitants to free water, either by taking it in buckets or laying pipes and taking it into their houses, so long as there is enough water. If they do the latter, the local authority is only supplying water to the works and not to the houses. Moreover, though these works are now vested in the board, they do not here exercise their power to supply water, for the water comes up out of the mine as it has always done. Section 56 of the Act of 1875, the charging section, has no application to this water at all.

[Romer L.J. It cannot be said that the board is still acting only under powers conferred by section 64, for the deed of 1912 granted their predecessors further rights.]

The local authority could not enter into agreements outside their statutory powers, for they are a statutory body. They did not acquire the water under the deed, but only a right that it should not be cut off. There was no acquisition of water under the Water Act, 1945, but only the acquisition for an ancillary purpose under section 64 of the Act of 1875. The local authority had no power to charge a water rate, and did not do so; and the board, their successors in title, have likewise no such power. If the free water in the standpipes is for the free use of the inhabitants, the board have no right to sell it to anybody else. They can only control the way in which the inhabitants make use of their own water.

H. S. Ruttle in reply. Section 64 cannot be isolated from other relevant sections of the Act of 1875, which must be read as a whole: see sections 51, 52, 53, 54 and 55. The defendant submits that section 64 is concerned only with a supply of water to works; but section 55 is concerned with precisely that subject-matter, and its language is similar to that of section 64, which must be read with it. Section 64 does not define the use to which the local authority may put the works, and does not preclude the local authority from supplying water to premises, notwithstanding that the water comes from works intended to furnish a gratuitous supply. The board is supplying water to premises and accordingly is entitled to charge a water rate under section 46 of the Third Schedule to the Water Act, 1945.

Cur. adv. vult.

June 29. Denning L.J. read a judgment in which he stated the facts, read section 64 of the Act of 1875, and continued: In 1950 the South Devon Water Board took over the water undertaking from the Totnes Rural District Council: and the board now seek to charge a water rate on all the inhabitants of Holne who have connected up their premises with the main. The inhabitants claim that they are entitled from time immemorial to have their water free from the Ringleshute stream, and that this is so whether they fetch it in buckets from the standpipes or direct by pipes from the main. The board admit that they are entitled to take it free from the standpipes, but say that they must pay a rate if they connect up their houses with the main.

The board seek to justify the rate by reason of section 56 of the Public Health Act, 1875, as now replaced by section 46 of the Third Schedule to the Water Act, 1945. Section 56 provided: "Where a local authority supply water to any premises they may "charge in respect of such supply a water rate to be assessed on "the net annual value of the premises. . . ." Section 46 provides: "Undertakers who supply water to any premises for domestic "purposes may charge in respect thereof a water rate. . . ."

The whole question depends, therefore, on whether the board "supply water to any premises" within the meaning of those sections. I think that they do. It seems to me that, when the board collect the water into *their* tank and pass it through *their* filter and thence into *their* main, the board thereby reduce the water into their possession: so much so, that if anyone tapped the main without their authority, the board would have sufficient property in the water to maintain larceny at common law: see *Ferens* v. *O'Brien*.[1] As the board have this special property in the water, it follows, I think, that when they permit a householder to connect up his house with the main, they supply water to his premises and are entitled to charge a water rate for it.

Mr. Squibb argued that this water was all part of a supply to which the inhabitants were entitled free of charge. It was all covered, he said, by section 64 of the Act of 1875 (as now replaced by section 124 of the Public Health Act, 1936): and that section 56 of the Act of 1875 (as now replaced by section 46 of the Third Schedule to the Act of 1945) had no application. The board, he said, could control the gratuitous supply to the inhabitants but could not charge for it. They could give or refuse permission to the inhabitants to connect up their houses with pipes, instead of using buckets, but could not charge for the water.

I do not agree with this contention, for the simple reason that section 64 is only concerned, I think, with the supply of water "for the gratuitous use of any inhabitants who choose to carry "the same away." It does not apply to supply to houses through connecting pipes. This is shown by the final words of section 64, and I do not think that section 124 of the Act of 1936 alters the position.

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[1] (1883) 11 Q.B.D. 2.

I would therefore allow the appeal and hold that the board is entitled to charge a water rate to those householders in Holne who connect up their premises to the main.

Birkett L.J. stated the facts and continued: Attempts had been made from time to time to charge the villagers for the water delivered to their premises by means of the pipes connected to the main; but the right of the villagers to take as much water as they want from the public standpipes free of all charge has never been challenged, and is not challenged now. The question to be decided is simply this: Can the board charge for the water delivered to the houses through the connecting pipes? Or is the water the "gratuitous supply" referred to in section 64 of the Public Health Act of 1875 and subsequent statutes, for example, section 124 of the Public Health Act, 1936? It is to be observed that section 64, dealing with the gratuitous supply of water, uses the important words "for the gratuitous use of any inhabitants "*who choose to carry the same away*."

Mr. Squibb submitted that the laying of the three-inch pipe in 1912, and the erection of the tank and filter, were the mere carrying out of the powers granted by section 64 of the Act of 1875 "substituting others equally convenient," to use the words of the section, and that the legal position of the villagers was in no way affected, for the rural district council were merely substituting water in pipes for the water which had formerly come in the open leat. He further submitted that there was no distinction to be made between inhabitants who go to the public standpipes for their water and carry the same away, and those who obtain their water through the connecting pipe.

The South Devon Water Order, 1950, brought the plaintiff board into being, and the authority of the Totnes Rural District Council came to an end. By section 56 of the Public Health Act, 1875, the rural district council were empowered to make a charge in respect of any water which they might supply to any premises. I do not think that any useful purpose would be served by a close examination of the various Acts and orders. For example, section 46 of the Third Schedule to the Water Act of 1945 is incorporated into the Order of 1950, but this section 46 merely reproduces section 56 of the Act of 1875. The board has no more power under the order than the rural district council had under the Act. It would appear from the minutes of the parish council that in 1946 the rural district council did try to impose water charges on the inhabitants of Holne, but it would also appear that they withdrew their claim on legal advice. I agree that the question we have to determine is the question which the county court judge put to himself: can the board on the facts of this case be said to be supplying water to the defendant's premises within the meaning of section 46 of the Third Schedule to the Water Act, 1945?

The judge said that the word "supply" involved (1) bringing water to the consumer, and (2) bringing him water to which he would not otherwise be entitled. He held that the acts of the rural district council in 1912 did not involve either of those things, and that the acts of 1920 in making the connexions did not involve the first. He held that the board were not entitled to charge this water rate and he entered judgment for the defendant.

In my opinion the distinction lies between the carrying away of the water from the standpipes, and the supply of water to the premises through the connecting pipes. I think, with great respect to the county court judge, that to make one of the elements of "supplying" that it must be "bringing water to "him to which he would not otherwise be entitled" is to confuse the true issue. Nobody has ever denied the right of the defendant or any of the villagers to go to the public standpipes and carry the water away. The rural district council for many years, and the water board since 1950, have brought this water to the public standpipes. But when, instead of carrying the water away, the water is delivered to the defendant in his home through the pipes, it seems to me quite impossible to say that that is not a "supplying" of water by the board, in the proper use of that word. The immemorial right to take and carry away the water from the public standpipes has tended to obscure the real issue in this case. For the main, the tank, the filter, the upkeep of the works generally, are all necessary for the gratuitous supply to the public standpipes; but I am of opinion that when pipes are laid to take the water from the board's main to the houses of the villagers, then the board can properly be said to be "supplying" and are entitled to make the charge which they have made in this case. I would allow the appeal.

ROMER L.J. stated the facts and continued: Under the powers conferred by section 64 of the Act of 1875 the rural district council might "construct any other such works for supplying water for "the gratuitous use of any inhabitants who choose to carry the "same away, not for sale, but for their own private use."

[His Lordship read the terms of the deed of January 5, 1912, and continued:] It would appear from this deed that the rural district council already possessed certain rights in relation to the water which emanated from the mine shaft, and that certain further rights, somewhat indefinite in character, were being granted by the deed. It also appears that the rural district council was at that time putting forward the view that the shaft itself and the leat were vested in the council. It is, however, clear that such rights and interests as it already possessed in relation to the water and the shaft and the leat were only held by the rural district council for the purpose of facilitating the enjoyment by the villagers of their ancient right to use the water; and at the date of the deed of 1912 the inhabitants were exercising that right by means of the three public standpipes which the rural district council had provided in the village street.

Following on the execution of the deed of 1912 the rural district council constructed a three-inch main, in substitution for the lower part of the open leat, into which the water was taken by means of a tank and filter. At the same time the tank at Playcross was disused and there was laid in substitution for the two-inch main a three-inch main to which the three public standpipes were connected. These new or substituted works were presumably carried out by the rural district council in pursuance of the rights which it acquired from Dawson, and under the authority which was vested in it by section 64 of the Public Health Act, 1875.

It is quite clear, in my opinion, that after 1912 the rural district council had no right—nor, indeed, did it claim any right—to levy any water rate on the inhabitants for the water which they took from the standpipes, notwithstanding that the pipes and the main which led thereto had been provided by the rural district council; for in carrying away the water for their own private use the villagers were merely exercising their immemorial right so to do in the only way that it was then possible for them to exercise it, namely, by taking the water from the standpipes. It is, however, important to notice that the water was being provided for the inhabitants to carry away and use; no water was being supplied to their premises.

In 1920 the Dawson Trustees, who owned a row of cottages in the village, laid a pipe at their own expense to connect up with the three-inch main which served the standpipes in order to provide the cottages with water. They obtained the permission of the rural district council before doing so. In 1926 the defendant's predecessor in title, without obtaining the permission of the rural district council, laid a pipe at his own expense to connect with the pipe which had been laid by the Dawson Trustees; and the question now in issue is whether the Totnes Rural District Council became entitled to levy a water rate under section 56 of the Public Health Act, 1875, on the defendant's predecessor in title in respect of the supply of water which he thus obtained to his premises, and whether the plaintiffs, as successors to the rural district council, are entitled to levy such a rate on the defendant under section 46 of the Third Schedule to the Water Act, 1945. Section 56 of the Act of 1875 provided that "Where a local authority supply water to any premises they may "charge in respect of such supply a water rate to be assessed on "the net annual value of the premises"; section 46 of the Third Schedule to the Act of 1945 provides that "Undertakers who "supply water to any premises for domestic purposes may charge "in respect thereof a water rate. . . ." So far as the present controversy is concerned the only issue, whether under the Act of 1875 or the Act of 1945, is whether the water which the premises of the defendant enjoy as a result of the connexion which his predecessor made, is "supplied" by the plaintiffs.

The defendant contends that the water which he receives into his premises is not "supplied" by the plaintiffs. The water, he says, is water which he is entitled to receive gratuitously as an inhabitant of the village of Holne, and that, although for practically the whole of its journey from the mine shaft, from which it emanates, it passes through works which are vested in the plaintiffs it is not supplied, but merely conveyed, by the plaintiffs. His argument is that on the passing of the Public Health Act the matter became governed by section 64 of the Act, and that section 56 of that Act, therefore, had no application; and that nothing has since happened to affect the position as it then existed, with the result that the plaintiffs have no power to charge him with a water rate under section 46 of the Third Schedule to the Water Act, 1945. In my opinion, these submissions of the defendant cannot be supported. It is true that the water which is conveyed from the mine shaft to the village has never been acquired by the plaintiffs or their predecessors for their own absolute disposal; nor, indeed, could it have been, in the absence of statutory authority, for they could only have acquired it subject to the villagers' immemorial right to use it. The fact, however, that the plaintiffs are not the owners of the water does not, in itself, displace the operation of section 46 of the Third Schedule to the Act of 1945. In the first place, the section is not in terms confined to water which has been acquired by and belongs to the undertakers, and I see no sufficient reason for implying this qualification. Secondly, it seems to me that in any case the plaintiffs do possess rights and interests in the water, albeit as trustees, in a sense, for the inhabitants of the village. As stated earlier, the recitals of the deed of 1912 indicate that the rural district council already had, or claimed that it had, such rights and interests; but, be that as it may, one of the recited objects of that deed was the acquisition by the rural district council of such water rights (if any) as might be necessary in addition to those already vested in the council, and by clause 2 of the schedule to the deed there was granted to the council, inter alia, the liberty and right of taking by means of the pipes therein mentioned water from the Ringleshute shaft and stream. It would accordingly appear that from at least January 5, 1912, the rural district council had a sufficient property and interest in the water to entitle it to an injunction restraining its diversion or any abstraction of the water other than the use of the water by the villagers in exercise of their ancient rights. A further reason, in my opinion, why the defendant's contention cannot be accepted is that the effective cause of a supply of water reaching the defendant's premises is the provision by the plaintiffs of the pipes and main which they or their predecessors installed. It is true that the premises would not receive the water were it not for the mine shaft from which it emanates; it is, however, equally true that the water from the shaft would not be available for use at the defendant's house but for the plaintiffs' pipes and mains which bring it there. It seems to me, therefore, that it is not an unreasonable distortion of language to say that the provision and maintenance of the plaintiffs' works constitute a supply of water by the plaintiffs to the defendant's premises.

For the above reasons, section 46 of the Third Schedule to the Water Act, 1945, applies, in my judgment, to the position, and the defendant is therefore liable to the water rate which the plaintiffs are seeking to impose. I accordingly agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Collyer-Bristow & Co. for Rossetti & Peppercorn, Kingsbridge; Smith & Hudson for Harold Michelmore & Co., Newton Abbot.*

M. M. H.

TEMPLE *v.* NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LD.

[Plaint No. Appln. 50/54.]

C. A.

1955
June 13,
14, 15.

Denning, Birkett and Romer L.JJ.

Landlord and Tenant—Rent restriction—Standard rent—Rateable value on appropriate day—Two flats made into one—Joint assessment—Property subsequently divided and separately assessed after appropriate day—Application to ascertain standard rent—Rateable value—Apportionment of original joint assessment—When property "first assessed"—Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 7 (2) (3).

In 1934 a building was erected in London which contained a number of flats of different sizes. When the flats were first let in 1935 a tenant desired that two flats, No. 28 and No. 27, a smaller flat adjoining it, should be turned into one. This was done and the two flats were jointly assessed at a rateable value of £147, which assessment was still in force on April 6, 1939, "the appropriate "day" for determining the rateable value of a dwelling-house in London in relation to the application thereto of the provisions of the Rent Restriction Acts. The tenant of the combined flats left in March, 1940, and the flats were again subdivided, the applicant becoming the tenant of No. 28. In 1941 the owners applied for a separate assessment of the flats and No. 28 was assessed at £95 and No. 27 at £34. In the present proceedings the applicant asked that the standard rent of flat No. 28 should be ascertained by the county court on the ground that the flat was "first assessed" within the meaning of section 7 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, when it was separately assessed in 1941 and that, as the amount of such assessment was less than £100, the Rent Restriction Acts applied. The deputy county court judge held that the case fell within section 7 (2) of the Rent and Mortgage Interest Restrictions Act, 1939. He apportioned the rateable value of the applicant's flat on the appropriate day as being £108 of the joint assessment of £147 in existence at that time, and dismissed the application:—

Held, that the dwelling-house was assessed on the appropriate day as part of a composite whole, and that accordingly, under section 7 (2) of the Act, the rateable value of the applicant's flat on that day must be apportioned by the county court; and that since that proportion amounted to a rateable value of over £100 the Rent Acts had no application and the applicant was not entitled to have the standard rent of the flat determined.

Rex v. *Sidmouth Rent Tribunal* [1951] 1 K.B. 778; [1951] 1 T.L.R. 408; [1951] 1 All E.R. 107 questioned.

APPEAL from deputy Judge Middleton sitting at the Marylebone County Court.

C. A.

1955

Temple v. National Mutual Life Association of Australasia Ld.

In 1934, a building containing thirty or more flats of varying sizes, and known as Ascot Court, was built at St. John's Wood. When the flats were first let in 1935 one of the tenants arranged that flat No. 28 and No. 27, a smaller flat adjoining it, should be made into one. This was duly done and the combined flats were assessed at a rateable value of £147, which assessment was still in force on April 6, 1939 " the appropriate day " in the metropolitan area for the purposes of the Rent and Mortgage Interest Restrictions Act, 1939. The original tenant of the combined flats left on March 25, 1940, and the flats were again divided into two separate flats, the present applicant, Lottie Edith Temple, becoming the tenant of No. 28. In 1941 the owners applied for a separate assessment of the two flats and on May 28, 1941, the rating authority assessed No. 28 at £95 and No. 27 at £34.

In the present proceedings the applicant asked that the standard rent of flat No. 28 be ascertained. The ground of her application was that the flat was assessed for the first time on May 25, 1941, within the meaning of section 7 (3) of the Rent and Mortgage Interest Restrictions Act, 1939,[1] and consequently that the rateable value of the flat was £95, and that as that figure was below £100, flat No. 28 was within the Rent Acts and she was, therefore, entitled to have the standard rent ascertained. For the owners it was contended that the flat was assessed, although jointly, on April 6, 1939, and that by the provisions of section 7 (2) of the Act of 1939 the amount of the joint assessment of £147 must be apportioned by the county court between the two flats as at that date. The deputy county court judge held that the case came within section 7 (2) of the Act and apportioned the figure in respect of No. 28 at £108. He was, therefore, of opinion that the Rent Acts did not apply to flat No. 28 and that consequently there was no standard rent to ascertain. He accordingly dismissed the application.

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[1] Rent and Mortgage Interest Restrictions Act, 1939, s. 7 (2): "In "relation to any dwelling-house of "which the rateable value on the "appropriate day" [April 6, 1939] "was not on that day separately "assessed, any reference in the pre- "ceding provisions of this Act to the "rateable value on the appropriate "day shall be construed as a refer- "ence to such proportion of the "rateable value on that day of "the property in which the dwelling- "house is comprised as may be "apportioned to the dwelling-house "by the county court in accord- "ance with the provisions of subsec- "tion (3) of section twelve of the "Increase of Rent and Mortgage "Interest (Restrictions) Act, 1920."

(3) "In relation to any dwelling- "house first assessed after the appro- "priate day, any reference in the pre- "ceding provisions of this Act to the "rateable value on the appropriate "day shall be construed as a refer- "ence to the rateable value on the "day on which the dwelling-house "was first assessed."

The applicant appealed.

I. H. Jacob for the appellant. The deputy county court judge was wrong in holding that the rateable value of flat No. 28 must be ascertained by the apportionment of the rateable value of £147 at which the combined flats, Nos. 27 and 28, were assessed on the appropriate day. Flat No. 28 was first assessed as such flat on May 28, 1941, and consequently under section 7 (3) of the Act of 1939 that was the proper date at which to ascertain its rateable value: see *Rex* v. *Sidmouth Rent Tribunal*,[2] and especially *per* Lord Goddard C.J. There was, therefore, no need to resort to apportionment to ascertain such value, since it should only be resorted to when it is "necessary": *Amphlett* v. *Dorrell*.[3] Subsections (2) and (3) of section 7 should be construed disjunctively. If there is an assessment made after the appropriate day, subsection (3) is applied and subsection (2) is excluded, the latter being resorted to only when there has been no assessment made of the dwelling-house. If there has been an assessment made after the appropriate day, that is the rateable value of the dwelling-house for the purposes of the Rent Acts. If that were not so, subsection (3) would have no application. In the present case the court has to determine the matter as at the date when judgment was given in the county court and, therefore, as flat No. 28 was first assessed on May 28, 1941, at £95, there was no necessity to resort to apportionment and the rateable value of the flat ought to be determined at £95.

Secondly, it is submitted that when the combined flat was divided, No. 28 became a new entity. In considering whether the alterations that were made had the effect of creating two entirely separate entities, the basic problem is, not merely what was the extent of the alterations, but the effect of them: see *R. & P. Properties Ld.* v. *Baldwin*,[4] *Langford Property Co.* v. *Goldrich*[5] and *Langford Property Co. Ld.* v. *Batten*.[6] The principle is the same whether there is a separation or a combination. If two flats let together as one are divided again into two, new entities are created, just as much as if two flats are let together as one for the first time. The county court judge should have held that there was a new entity created when the combined flat was divided into two. *Capital and Provincial Property Trust Ld.* v. *Rice* [7] is to be distinguished in that it dealt with the apportionment of rent and not of rates.

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[2] [1951] 1 K.B. 778, 781; [1951] 1 T.L.R. 408; [1951] 1 All E.R. 107.

[3] [1949] 1 K.B. 276; 65 T.L.R. 1; [1948] 2 All E.R. 674.

[4] [1939] 1 K.B. 461, 467, 468; [1938] 4 All E.R. 845.

[5] [1949] 1 K.B. 511; [1949] 1 All E.R. 402.

[6] [1951] A.C. 223; 66 T.L.R. (Pt. 2) 958; [1950] 2 All E.R. 1079.

Thirdly, the county court judge made his apportionment without applying his mind to the relevant considerations as laid down in *Bainbridge* v. *Congdon*,[8] and it is submitted that on any consideration of the size, aspects and amenities of the two flats the apportionment of the proportion of the rateable value of £147 attributable to flat No. 28 should be less than £100 and, if necessary, the case should be remitted for a new trial on this issue.

Michael Hoare for the respondent. The decision of the deputy county court judge was right. Flat No. 28 was not "first "assessed" on May 28, 1941, but when the two flats were let together as one at a rateable value of £147, albeit that it was then assessed as part of a larger entity. When it was assessed in May, 1941, it was not assessed for the first, but for the second time. It was necessary to resort to apportionment to ascertain the rateable value of No. 28 because the object of the Act of 1939 was to relate rateable values for the purposes of that Act to the values then existing as at the passing of the Act. It would not be right to determine the rateable value of a dwelling-house by having regard to the fluctuations in rateable values which took place due to the war-time changes and conditions. *Rex* v. *Sidmouth Rent Tribunal*,[9] relied on for the appellant, did not really deal with the point raised by the present case but with the question of the jurisdiction of the rent tribunal, and the judgments of Lord Goddard C.J. and Hilbery J. clearly indicate that an apportionment might have been made in that case, although there had been none at the time when the matter was referred to the rent tribunal. The reference made to apportionment could only have been made on the basis that, notwithstanding that the flat there in question was first separately assessed after the appropriate day, its rateable value should be ascertained by a process of apportionment.

On the second and third questions raised, the findings of the deputy judge that there had been no change in the identity of the structure and in regard to the apportionment were findings of fact and should not be disturbed.

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[7] [1952] A.C. 142; [1951] 2 T.L.R. 557; [1951] 2 All E.R. 600.

[8] [1925] 2 K.B. 261; 41 T.L.R. 480.

[9] [1951] 1 K.B. 778.

I. H. Jacob in reply. A "first assessment" can be one made after the "appropriate day" notwithstanding the fact that a combined assessment was made at an earlier date: see observations of Scrutton L.J. in *Barrett* v. *Hardy Brothers (Alnwick) Ld.*[10] The Act of 1920 did not apply to new houses: by parity of reasoning section 7 (3) of the Act of 1939 (which corresponds to section 12 (1) (*e*) of the Act of 1920) is not confined in its operation to new houses alone. Thus section 7 (3) of the Act of 1939 can apply to houses first assessed as separate entities after the "appropriate day."

Rex v. *Sidmouth Rent Tribunal*[11] is explicable only on the basis that the relevant assessment was a "first assessment" notwithstanding the existence of an earlier composite assessment similar to the composite assessment of Nos. 27 and 28 prior to 1941 in the present case.

[BIRKETT L.J. How then can it be said that the separate assessments of 1941 were "first assessments"?]

[ROMER L.J. In the *Sidmouth* case[11] Hilbery J. seems to have thought that, although the case was one to which section 7 (3) applied, it could at any moment have become one to which section 7 (2) applied, if an application to apportion had been made.]

[DENNING L.J. If the argument for the respondents is right, it looks as if the decision in the *Sidmouth* case[11] was wrong.]

DENNING L.J. In 1934, a new block of flats was built in St. John's Wood overlooking the Lord's cricket ground. It was called Ascot Court. The question for determination is whether flat No. 28 in this block is within the Rent Acts or not. This depends on its rateable value. If the rateable value on the appropriate day did not exceed £100 it is within the Act. If it was more than £100 it is outside the Act. The problem arises in this way. The next flat to No. 28 is a smaller flat, No. 27. When the flats were first let in 1935, those two flats, 27 and 28, were taken by a tenant who wanted much space and took them both together. They were thrown into one flat and let as one. This composite flat was assessed as one whole at a rateable value of £147 a year, and that assessment was in force in 1939. If that figure of £147 is apportioned as it has now been, between the two flats, it gives a rateable value of £108 to No. 28 and £39 to No. 27. That would mean that in 1939 No. 28 was over £100 rateable value. In 1940, however, the tenant left and the composite flat was divided again into two separate flats. Owing to the war many people had left London and flats were difficult to let. In 1941, therefore, the owners asked for a new separate assessment of the two flats. On May 28, 1941, the rating authority assessed No. 28 at £95 and No. 27 at £34. That means that in 1941 No. 28 was under £100 rateable value. On March 7, 1945, the two flats were re-assessed. Flat No. 28 was raised to £107 and flat No. 27 to £38, so that in 1945 flat No. 28 was over £100 rateable value.

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[10] [1925] 2 K.B. 220; 41 T.L.R. 426.

[11] [1951] 1 K.B. 778.

In those circumstances the crucial question is, how is the rateable value of flat No. 28 to be ascertained? Is it to be ascertained on the 1939 figure when it was over £100 or on the 1941 figure when it was under £100? As I read the Act of 1939, if the flat was assessed on April 6, 1939, the rateable value must be assessed as at that date. But if the flat was first assessed after April 6, 1939, the rateable value must be ascertained as on the day it was first assessed.

In my opinion, in this case, the flat was assessed on April 6, 1939. It is true that it was not then separately assessed, but it was assessed as part of a composite whole. In those circumstances, the case comes within section 7 (2) of the Act of 1939 and the rateable value is to be ascertained by apportionment of the £147, which was the 1939 figure for the whole.

Mr. Jacob, for the tenant, urged us to say that flat No. 28 was first assessed in 1941, on the occasion when it was first assessed separately. The figure was then £95, which would bring it within the Act. He said that the case comes within section 7 (3) of the Act of 1939. I do not think that that is correct. Section 7 (3) only applies to cases where the dwelling-house was not assessed at all on April 6, 1939, not even as part of a composite whole. That might happen, for instance, because it was built since that date or was converted so as to become a new entity since that day or something of that kind. Nothing of that kind appears here. Mr. Jacob referred us to *Rex* v. *Sidmouth Rent Tribunal.*[1] It may well be that that case can be justified on its special facts on the ground that, owing to the conversion into flats, a new entity was created; but in so far as it proceeded on any other ground, I do not agree with it.

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[1] [1951] 1 K.B. 778; [1951] 1 T.L.R. 409; [1951] 1 All E.R. 107.

Mr. Jacob next urged us to say that in the present case, when the composite flat was divided into two, a new entity was created, and he referred us to *R. & P. Properties Ld.* v. *Baldwin.*[2] But it seems to me that the observations of Lord Porter in *Capital and Provincial Property Trust Ld.* v. *Rice*[3] dispose of that suggestion. The county court judge has found here that there was no creation of a new entity and his finding on that point should not be disturbed.

The matter becomes one simply of apportioning the £147 in proper proportion between the two flats. The judge attributed £108 to No. 28 and I see no ground for interfering with that figure. It is, indeed, under the Act final and conclusive. This means that flat No. 28 is outside the Act because the rateable value on the appropriate day, April 6, 1939, was over £100. The appeal must, therefore, be dismissed.

BIRKETT L.J I am of the same opinion and there is very little I would desire to add. My Lord has stated the facts of this case and the nature of this appeal and has dealt succinctly with the three points which were raised by Mr. Jacob. The first point seems to me to be the only substantial point that Mr. Jacob had to make, and that was that section 7 (3) of the Act of 1939 was the appropriate section in relation to the facts of this case. Mr. Jacob contended that flat No. 28 was first assessed on May 28, 1941, when the rateable value was stated to be £95. His other two points about the change of identity and the apportionment were all made upon the basis if he should be wrong on the first point. I cannot add to what my Lord has said about that first point. It seems to me that, although it would be wrong to say that any point under the Rent Acts is a simple point, at any rate the point can be simply stated. Mr. Jacob's contention was that there was a first assessment in 1941. It is plain beyond doubt that there had been an assessment of No. 28 before 1941, though it is true that at that time it was not a separate assessment. It was an assessment in conjunction with No. 27, but, nevertheless, it was an assessment. I read section 7 (3) as saying in relation to any dwelling-house first assessed after the appropriate day (the appropriate day being April 6, 1939) that the provisions of the section apply. It seems to me on the facts of this case impossible to say, giving the language its proper meaning, that this was in fact the first assessment. There had been an assessment and, therefore, without concerning myself with the second and third points, I am entirely of my Lord's opinion on the first point and agree with his conclusion.

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[2] [1939] 1 K.B. 461; [1938] 4 All E.R. 845.

[3] [1952] A.C. 142, 150; [1951] 2 T.L.R. 557; [1951] 2 All E.R. 600.

ROMER L.J. I also agree. The general principle of the Act of 1939 was to resort for the purposes of the Act to the rateable value of premises as at a particular date (April 6, 1939, in the case of properties in London) where such resort is practicable. Where such resort cannot be made in relation to any particular dwelling-house because the house had not been assessed at that date, then some other point of time had to be selected, and section 7 (3) provides that in such cases the date is to be the date of first assessment. The expression in section 7 (3), "first "assessed," postulates that a dwelling-house had not been assessed at all at the relevant date. If it had been assessed at that date, then section 7 (3) cannot, in my opinion, apply. In the present case it cannot be said of flat No. 28 that it had not been assessed on April 6, 1939, because it had been included in an assessment which had been made on February 6, 1935, and which was still current in 1939. It is true that it had not been separately assessed, but it had undoubtedly been assessed. In those circumstances it accordingly cannot be said, in my opinion, that it was first assessed after April 6, 1939, and it follows that section 7 (3), which, be it noted, operates on dwelling-houses first assessed and not on dwelling-houses first separately assessed after the appropriate date, does not apply. It appears to me that section 7 (2), which appears to envisage in its application, and to include, dwelling-houses which had been assessed jointly with other dwelling-houses, precisely fits the facts in the present case; whereas section 7 (3) does not apply by reason of the assessment made in 1935. On the other two points to which my Lord has referred I have nothing to add to the conclusion which he has expressed, that they were matters for the county court judge to decide and that his decision will not be interfered with in this case by this court. I accordingly agree that the appeal be dismissed.

Appeal dismissed.

Solicitors: *Harold Miller & Co.; Markby, Stewart & Wadesons.*

P. B. D.

REGINA v. CLARK.

C. C. A.

1955
July 4.

Lord Goddard C.J., Devlin and Donovan JJ.

Criminal Law — Evidence — Character — Imputation upon character of witnesses for prosecution — Confession — Accused's allegation that written statement manufactured by police — Not mere denial of statement—Cross-examination as to character of person charged—Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1 (*f*) (ii).

The appellant was charged with breaking and entering and larceny. His defence was that if he was with those concerned in the breaking he had had nothing to do with it. At the trial it was suggested by the defence that a written statement signed by the appellant, which, if true, amounted to a confession, was not the statement of the appellant but was untrue and had been dictated by a chief inspector of police to a police officer and signed by the appellant because he was frightened. Cross-examination as to the appellant's previous convictions was allowed on the ground that the nature and conduct of the defence was such as to involve imputations on the character of the witnesses for the prosecution within proviso (ii) to section 1 (*f*) of the Criminal Evidence Act, 1898:—

Held, that, as the appellant had not merely denied that he had made the statement but had alleged that the police officers had concocted it, he had made on the character of the prosecution witnesses a serious imputation, which, since it formed no part of the defence but was an answer to the evidence and amounted to an attack on the character of the police officers outside their evidence, fell within the wording of the statute and, accordingly, the cross-examination as to previous convictions was properly allowed.

Rex v. *Jones* (1923) 17 Cr.App.R. 117; 39 T.L.R. 457 followed.

Rex v. *Biggin* [1920] 1 K.B. 213; 36 T.L.R. 17; 14 Cr.App.R. 87 explained.

APPEAL against conviction.

The appellant was tried at Surrey Quarter Sessions on charges of breaking and entering and larceny with three other men and was convicted. At the trial evidence was given by police officers in respect of two matters; first, a verbal statement containing admissions made by the appellant at a police station after his arrest, and, secondly, a written statement, signed by the appellant, which, if true, amounted to a confession. As regards the verbal statement, the defence put it to the police officer that the conversation never took place at all, but that another conversation of a somewhat similar character had taken place at another police station later on, and the appellant denied making any admissions. As to the second, the signed statement, the defence suggested in cross-examination and the appellant said in evidence that it was not his statement but had been dictated by a chief inspector of

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police to a detective constable who had written it down and that he (the appellant) had signed it because he was frightened, and that it was untrue. On an application by counsel for the prosecution under section 1 (*f*) (ii) of the Criminal Evidence Act, 1898,[1] on the ground that the nature and conduct of the defence involved imputations on the character of the witnesses for the prosecution, the deputy chairman allowed cross-examination of the appellant as to his previous convictions.

The prisoner appealed against conviction on the ground that in the circumstances cross-examination as to his character had been improperly allowed.

Robin Simpson for the appellant. The deputy chairman, in ruling that cross-examination as to the appellant's previous convictions should be allowed, was most influenced by what the appellant alleged as to the verbal conversation with the police officer. It is submitted that the mere suggestion that that particular conversation did not take place but that later on there was another conversation of a similar nature elsewhere, although the appellant denied making any admissions, did not entitle the prosecution to put the character of the appellant in issue, and that, since the deputy chairman was wrong in allowing the cross-examination on that ground, this court cannot take into account what the defence suggested in regard to the written statement, because the chairman did not consider that.

As to the defence regarding the written statement: in any case in which the prosecution seek to prove their case either wholly or in part by a confession they must prove affirmatively, by calling the police officer who took the statement, both that it was made by the defendant and that it was made voluntarily. Once the prosecution have proved those two elements a prima facie case is raised, unless the defendant can establish either that it was not his statement or that it was not a voluntary statement; evidence by a defendant to that effect, therefore, is a necessary and relevant element in his defence and, provided that it does not go outside the matters given in their evidence, is not a general attack upon the conduct of the particular witness for the prosecution within proviso (ii) to section 1 (*f*) of the Criminal Evidence Act, 1898: see the interpolatory remarks of Lord Reading C.J. in *Rex* v. *Biggin*,[2] "The imputations upon the character of the "dead man were a necessary element in the defence," and the observation of Avory J.[3] [Reference was also made to *Rex* v. *Westfall*.[4]]

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[1] Criminal Evidence Act, 1898, s. 1 (*f*): "A person charged and "called as a witness . . . shall not be "asked . . . any question tending to "show that he has commited or been "convicted of . . . any offence other "than that wherewith he is then "charged, or is of bad character, "unless—. . . (ii) he has personally "or by his advocate asked questions "of the witnesses for the prosecution "with a view to establish his own "good character . . . or the nature or "conduct of the defence is such as to "involve imputations on the character "of the prosecutor or the witnesses for "the prosecution . . ."

In *Rex* v. *Biggin*[5] imputations were made by the defendant as to improper suggestions made to him, which were not necessary for the defence, and in that case, and in *Rex* v. *Turner*,[6] where imputations upon the character of a witness for the prosecution were not part of the main defence, the court held that the character of the defendant should not have been put in issue. It is conceded that those two cases can be distinguished because the imputations were relevant to the alleged criminal acts themselves, but it is submitted that the same principle applies in a case where, for example, the only evidence against a defendant was a written confession and where it would be a complete answer to the charge if the defendant could prove either that it was not his statement or that it was not made voluntarily. A defendant, in seeking to prove that, does not run the risk of putting his character in issue.

[DEVLIN J. Is that not confusing the answer to the charge and the answer to the evidence on which the charge is based? It is not that the appellant in this case could not make a defence without attacking the character of the police witnesses, but that he could not deal with that piece of evidence without doing so.]

Had the appellant confined himself to saying that it was not his statement, he would have had to amplify that denial in cross-examination. Reliance is placed upon the statement of the law by Channell J. in *Rex* v. *Preston*,[7] where he said that the latter part of section 1 (ii) (*f*) meant that the defence was so conducted as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution[8] "upon "the ground that his conduct—not his evidence in the case, but "his conduct outside the evidence given by him—makes him an

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[2] [1920] 1 K.B. 213, 217; 36 T.L.R. 17; 14 Cr.App.R. 87.

[3] [1920] 1 K.B. 213, 217.

[4] (1912) 7 Cr.App.R. 176; 28 T.L.R. 297.

[5] [1920] 1 K.B. 213.

[6] [1944] K.B. 463; 60 T.L.R. 332; [1944] 1 All E.R. 599; 30 Cr. App.R. 9.

[7] [1909] 1 K.B. 568, 575; 25 T.L.R. 280; 2 Cr.App.R. 24.

[8] [1909] 1 K.B. 568, 575.

"unreliable witness." The defence in this case was based not upon the character of the police officers outside their evidence but upon their evidence in the case and the statement which it was necessary for the prosecution to prove. It has been held again and again that merely to suggest to a police officer that he is committing perjury is not such an attack as to put the character of the defendant in issue. *Rex* v. *Wright*,[9] where there was an allegation of bribery, and *Rex* v. *Jones*,[10] where there was a gratuitous attack upon the conduct of witnesses by the defence, are distinguishable. It is submitted that *Rex* v. *Wright*[11] goes too far and should not be followed. In this case it was merely put to the police officer in cross-examination that in fact the statement was not that of the appellant but was that of the officers, having been dictated by one of them and written down by the other, and that the appellant had signed it because he was frightened; it is not right to say that, because the inference was that the chief inspector had concocted the statement, that let in the character of the appellant. [Reference was also made to *Rex* v. *Grout*[12] and *Rex* v. *Jones*.[13]]

If the cross-examination as to character was properly admitted in this case, it means that any defendant who says that a statement was not his, or that it should not be admitted because it was not made voluntarily, thereby puts his character in issue.

B. Stuart Horner, for the prosecution, was not called upon.

LORD GODDARD C.J. The sole question raised by this appeal is that the deputy chairman permitted cross-examination of the appellant with regard to previous convictions, and it is said that there were no grounds on which the prosecution were entitled to ask those questions.

Although this class of case is perhaps not as common as it used to be, we have constantly had these questions as to the right of counsel to cross-examine as to character, and I agree with Mr. Simpson, to whom the court is indebted for a very thorough and careful argument, that it is a case of importance.

The case arises because of an attack made by the appellant on the police with regard to a statement he had made and signed. Any judge who has had any experience on circuit or at the Central Criminal Court, as we all have, knows that one of the commonest things with prisoners who have made the fullest and most complete statements admitting their offences, and signed them, is that when they come to trial they repudiate the statements, and generally say that they were obtained by some improper means. In this case the appellant does not say that the written statement was obtained from him by any threat or by any inducement, but that at the police station, when the detective was going to take his statement and had started to write down the heading, which is a caution, the chief inspector, in whose room he had previously been, came into the room and proceeded to dictate to the detective what he was to write down, so that it was not the appellant's statement at all, but the statement of the chief inspector, and the appellant says that it was all untrue. That means that the chief inspector, for the purpose of getting a conviction, not only manufactured a statement but manufactured a statement which had not a word of truth—a sufficiently serious accusation against a high-ranking police officer of considerable standing.

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[9] (1910) 5 Cr.App.R. 131.

[10] (1923) 17 Cr.App.R. 117; 39 T.L.R. 457.

[11] 5 Cr.App.R. 131.

[12] (1909) 3 Cr.App.R. 64; 26 T.L.R. 59.

[13] (1909) 3 Cr.App.R. 67, 68.

When the appellant was first arrested he made various statements which, if the jury accepted them, and they did, would have been quite enough to ensure his conviction. They amount as near as possible to a complete confession, but the statement which the appellant made afterwards amplified what he had said before and told the whole story in the form of a confession, and Mr. Simpson does not pretend that the written statement is anything but a full confession or that he could have hoped for a verdict from the jury once that statement was put before them. The first, although not the principal, point which Mr. Simpson took was that the deputy chairman emphasized in the course of his ruling on the matter, and paid more attention to, what the appellant said about the verbal statement, and whether that amounted to an attack on the police than to what he said about the written statement. Mr. Simpson invited us to say that if the deputy chairman was wrong in having allowed the cross-examination on that account we could not consider what the appellant said in relation to the written statement because the deputy chairman was not considering it. I am afraid that we cannot take that view. The only question which the court has to decide is whether the cross-examination as to previous convictions was legally admissible or not, and, if it was, it is nothing to the point to say that the deputy chairman admitted it on some other ground. We have to see whether on the whole of the case the prosecution were entitled to cross-examine as to character. If the appellant's allegations concerning the written statement supplied the material or the ground for allowing the cross-examination we need not trouble ourselves about the denial of the oral statement, because there was only one cross-examination as to the appellant's character.

Section 1 (*f*) of the Criminal Evidence Act, 1898, entitles the prosecution to cross-examine a prisoner as to character on several grounds, one of which is if "the nature or conduct of the defence "is such as to involve imputations on the character of the "prosecutor or the witnesses for the prosecution."

There is no doubt, especially in the early days of the Court of Criminal Appeal, that there were a good many decisions on this point and at first sight, as indeed it has been said in more than one case, it may look as though the line was a very fine one; but I think that an examination of the cases shows that, as very often happens when a new statute has to be considered—and it must be remembered that the Court of Criminal Appeal only began to act in 1908—at first the court was going very slowly and carefully, if I may use the words, into what had hitherto been somewhat unexplored country. Until the Criminal Evidence Act, 1898, except in a few cases, such as rape, which was an exception introduced in the Criminal Law Amendment Act, 1885, no prisoner could give evidence at all. It was not, therefore, until the Court of Criminal Appeal began to sit in 1908, ten years after the Act of 1898 was passed, that any considered judgments were given regarding the grounds on which such cross-examination could be permitted, because I do not think that any case was ever reserved for the Court of Crown Cases Reserved on this point.

The first duty of the court is to read the statute, consider exactly what it states, and apply it. As was said in *Rex* v. *Hudson*,[1] the words of the statute are not qualified; it does not say anything about "unnecessarily" or "unreasonably" introducing imputations. It simply states: "or the nature or "conduct of the defence is such as to involve imputations on "the character of the prosecutor." From an early stage in the history of this class of law it has been held that if a prisoner on a charge of rape or indecent assault cross-examined the prosecutrix to show that she had consented, that did not enable the prosecution to cross-examine the prisoner with regard to his record. A good many reasons have been given for that, but

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[1] [1912] 2 K.B. 464, 471; 28 T.L.R. 459.

I think probably the safe ground upon which that cross-examination is allowed is that it is always necessary in a charge of rape to establish three things; first, that there had been carnal knowledge of the prosecutrix; secondly, that the prisoner was the man who had carnal knowledge of her; and thirdly, that it was done against her will. It is not necessary for the prisoner to prove consent, although he may be able to do so or to destroy her evidence by cross-examination, but it is for the prosecution to prove that there was lack of consent; I think, therefore, that the courts have considered that the prisoner is entitled, if he can, to destroy her evidence by cross-examination of the prosecutrix or by giving evidence that one of the incidents of the crime is not present, even though that may involve some imputation on the character of the woman. For instance, if an apparently respectable married woman is asked questions about whether or not she consented, that would seem to involve some imputation upon her. The prisoner is asserting that she did consent, and if his counsel cross-examines her on that line it would seem that it involved some imputation; but there is no doubt that the rule is now quite fixed that the mere fact that the prisoner's counsel, or the prisoner himself in evidence, has alleged that the woman was a consenting party, in an effort to break down one of the essential elements of the crime, is not enough to render the prisoner liable to be cross-examined as to his character. That also, I think, may be the explanation of *Rex* v. *Biggin*,[2] a decision on which Mr. Simpson strongly relied and in which a conviction for manslaughter was quashed. In that case a charge of murder was reduced to manslaughter, and the conviction was quashed because the prisoner had been cross-examined as to his character. He undoubtedly did not deny that he had killed the man whose death was the subject of the charge, but he said that the man had made indecent overtures to him, that a fight ensued, and that in the course of the fight as a matter of self defence he killed the man. He was then cross-examined as to his previous convictions. The court felt some difficulty about the case, but the prisoner was relying on provocation or self defence, and the facts had to come out. Somebody had to explain why the attack took place, and until that was explained, and why people should have been in the same room, and why there was a fight, it was impossible for any defence to be developed at all.

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[2] [1920] 1 K.B. 213.

In the present case the appellant's defence was: "I am not "one of the men who broke into the place; if I was with the "people I had nothing to do with it." He told the police in his statement that he kept watch, but his case was that he was not involved in the matter at all. His defence was not that an untrue confession was got out of him. It is true that the confession was used against him to prove that he was the guilty man, but he sought to get out of his confession by saying: "I never made that confession at all. It is true I "signed it. The policeman wrote it down, but I never "said it. It was the chief inspector who came in and told the "detective constable to write down what he told him and he "did so." If that were true—and it must be taken that the jury rejected it—it was about as serious a charge to make against two police officers as could well be imagined. It was not: "they induced me by a promise of favour if I made a "confession" or "I would get off light," but: "they concocted "a confession which was not my confession at all and, therefore, "you, the jury, ought to pay no attention to it because this is "a plot on the part of two police officers." If that is true, the two police officers were committing a criminal offence: how it can be said that that is not casting an imputation on them I find it difficult to understand, for they could have been indicted at the next quarter sessions for conspiracy to defeat the ends of justice and also for perjury.

I think that this matter, so far as this court is concerned, can really be said to be concluded by two cases, both of them fairly early in the history of the court, which so far as I know have never been reversed. One is *Rex* v. *Wright*,[3] when the court consisted of Darling, Phillimore and Bucknill JJ. In that case the prisoner, who had made a complete confession, said that the confession had been got out out of him by bribery, by being given tobacco and being allowed to smoke. Darling J., giving the judgment of the court, said[4]: "If the appellant puts it that he "was improperly induced to make and sign the statement that "was produced, it is difficult to imagine anything more like an "imputation on a witness for the prosecution. It is imputed to "the witness that, having a man in his custody, he bribed him, "and so by that means got him to make the confession. It is "contended by Mr. Churchill that this case comes within

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[3] (1910) 5 Cr.App.R. 131.

[4] Ibid. 133.

"*Preston*[5] in which Channell J. delivered judgment. But on "what ground did Channell J. really put the decision? . . . he "says[6]: 'The present case obviously is very near the line,' "and . . . he says[7]: 'The statement in the present case was a "'mere unconsidered remark made by the prisoner without giving "'any serious attention to it,' etc. The imputation in the case "now before us was that the police inspector was not a fit person "to remain in the force; had he done what was imputed to him "there is no doubt he could have been dismissed from the force; "it is the gravest possible imputation, and cannot be excused by "the contention that it was the only way open to the appellant of "meeting the case against him." I observe that the judge said that it was difficult to imagine anything more like an imputation on the witness for the prosecution. This case is even worse, because in *Rex* v. *Wright*[8] it was merely suggested that to get the confession out of the prisoner the police officers bribed him with tobacco, while in the present case it is said that they concocted the confession, and that the confession was never that of the appellant, but was dictated by the police officer.

The other case to which I would refer is *Rex* v. *Jones*,[9] where the matter was very much the same as it is here. In the course of the argument Shearman J. said[10]: "Here appellant said that "the police deliberately held him up on remand after remand, "and as they could not get evidence they concocted it"—that is what is said here, that as the police had not evidence they concocted it—and Lord Hewart C.J. said[11]: "It is one thing to deny "a statement; it is another thing to say that the statement has "been deliberately and elaborately manufactured." In giving judgment, Lord Hewart C.J. cited[12] *Rex* v. *Preston*[13] rather more fully, quoting Channell J.[14] (and no greater authority on these matters ever lived) thus[15]: "'If the defence is so con-"'ducted, or the nature of the defence is such, as to involve the "'proposition that the jury ought not to believe the prosecutor or "'one of the witnesses for the prosecution upon the ground that "'his conduct—not his evidence in the case, but his conduct out-"'side the evidence given by him—makes him an unreliable "'witness, then the jury ought also to know the character of the

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[5] [1909] 1 K.B. 568.
[6] Ibid. 575.
[7] Ibid. 576.
[8] (1910) 5 Cr.App.R. 131.
[9] (1923) 17 Cr.App.R. 117; 39 T.L.R. 457.
[10] 17 Cr.App.R. 117, 118.
[11] Ibid.
[12] Ibid. 119.
[13] [1909] 1 K.B. 568.
[14] Ibid. 575.
[15] 17 Cr.App.R. 117, 119.

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" 'prisoner who either gives that evidence or makes that charge, " 'and it then becomes admissible to cross-examine the prisoner " 'about his antecedents and character with the view of showing " 'that he has such a bad character that the jury ought not to " 'rely upon his evidence. That is the general nature of the " 'enactment and the general principle underlying it.' A clear " line is drawn between words which are an emphatic denial of the " evidence and words which attack the conduct or character of the " witness. Applying that ratio decidendi to the present case, it " appears to this court that it comes within the line of saying what " is forbidden. It was one thing for appellant to deny that he " had made the confession; but it is another thing to say that " the whole thing was a deliberate and elaborate concoction on " the part of the inspector; that seems to be an attack on the " character of the witness."

Those two cases seem to be entirely in point. This was an attack by the appellant, not on the evidence of the police inspector, but on his conduct outside that evidence. It is one thing to say: "That is not my statement"; it is another thing to say, as prisoners very often do: "Well, yes, but he misunderstood me; " he has got down something I did not say; I missed it when it " was being read over, but what I said was something else," and very often a specious and plausible paraphrase of something which would make the sense of the statement different is given; or sometimes the prisoner says: "The officer left out something." In all such cases there is really no difficulty, and it should be remembered that it is always in the discretion of the judge to rule out a cross-examination and to tell counsel for the prosecution that he is not going to allow a cross-examination as to previous convictions. I do not want to make any joke about the matter or to put it otherwise than perfectly seriously, but one knows well that police officers are regarded as fair game for cross-examination and to make charges against, and I do not believe that any judge would allow a roving cross-examination into the prisoner's past merely because he said, "The police constable is a liar," or "The police " constable is not telling the truth"; for all he is doing is pleading not guilty with emphasis, or, as Darling J. said in *Rex* v. *Rouse*,[16] that is "merely an emphatic mode of denial." It is quite another thing to make the suggestion against police officers that they have been conspiring together to defeat the ends of justice.

[16] [1904] 1 K.B. 184, 187; 20 T.L.R. 68.

Mr. Simpson, in the course of his argument, put this point very forcibly: if we uphold cross-examination in this case it simply means that a prisoner can never deny a statement. I would say that the answer to that is this: if a prisoner, having signed a statement to a police officer and having put his signature as they always do in two places, one at the end of the caution and one at the end of the statement, alleges that the police have concocted the statement, he does so at the risk of having his character laid bare, if he has a character which it is his wish to conceal, because clearly, if misconduct is to be attributed to police officers, the jury is entitled to know the character of the man making the imputation; and it is not to be thought that the man who is making the imputation, if he has a string of convictions, stands in the same position as an inspector of police or any other officer who must be a man of good character.

For these reasons the court is of opinion that the cross-examination was properly admitted in the present case, and therefore the appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Wontner & Sons.*

J. F. L.

In re M., AN INFANT.

[Plaint. No. K. 968.]

C. A.
1955
June 22, 23;
July 6.

Denning, Birkett and Romer L.JJ.

Adoption—Consent of parent—"Parent"—Application for adoption order by mother of illegitimate child and her husband—Refusal of consent by natural father of child—Father of illegitimate child not a "parent"—Consent not necessary—Adoption Act, 1950 (14 *Geo.* 6, *c.* 26), *ss.* 2 (4) (*a*), 10, 45.

The word "parent" in the Adoption Act, 1950, does not include the father of an illegitimate child.

The mother of a twelve-year-old illegitimate child and her husband applied to the court for an adoption order in respect of the child. The child's father (a person against whom no affiliation order had been made and who had not entered into any agreement to contribute to the child's maintenance) was made a respondent to the application and refused his consent to the adoption and sought to be heard on the merits of the adoption order:—

Held, that as the father was not a "parent" within the meaning of the Act, his consent was not necessary under section 2 (4) (*a*) to the making of an adoption order, and the applicants were entitled to an order.

Per Romer L.J. The consents required under section 2 (4) (*a*) are essentially linked with the transfer of rights which results from an adoption order under section 10 of the Act; but the father of an illegitimate child has no rights in respect of it at common law, and such locus standi as a man possesses with regard to a natural child who becomes a ward in the Chancery Division falls far short of a right such as section 10 is concerned with.

Butler v. *Gregory* (1902) 18 T.L.R. 370 approved.

Appeal from Judge Myles Archibald, sitting in chambers at Huddersfield County Court.

In 1943, a child was born to a single woman aged 20 and a married man aged 40, who was separated from his wife. The man, mother and child lived together until April 10, 1954, when the mother left, taking the child with her, and on May 15, 1954, she married another man. On March 8, 1955, the mother and her husband applied under section 1 of the Adoption Act, 1950,[1] for an adoption order to be made in their favour in respect of the child. The county court judge, while saying that the child was well looked after by her mother and the mother's husband, adjourned the hearing in order that the father of the child might be joined as respondent to the proceedings, on the ground that he was a "parent" within the meaning of section 2 (4) (*a*) of the Act and was accordingly a person whose consent was necessary before the adoption order asked for could be made. The father, who appeared in person before the county court, refused his consent, and on April 15, 1955, the county court judge refused to make an adoption order.

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[1] Adoption Act, 1950, s. 1: "(3) "An adoption order may be made "authorizing the adoption of an "infant by the mother or father of "the infant, either alone or jointly "with her or his spouse."

S. 2: "(4) Subject to the provisions "of section three of this Act, an "adoption order shall not be made— "(*a*) in any case, except with the "consent of every person or body who "is a parent or guardian of the infant "or who is liable by virtue of any "order or agreement to contribute to "the maintenance of the infant;"

S. 10: "(1) Upon an adoption order "being made, all rights, duties, obligations and liabilities of the parents "or guardians of the infant in relation "to the future custody, maintenance "and education of the infant, including all rights to appoint a guardian "and (in England) to consent or give "notice of dissent to marriage, shall "be extinguished, and all such rights, "duties, obligations and liabilities "shall vest in and be exercisable by "and enforceable against the adopter "as if the infant were a child born "to the adopter in lawful wedlock; . . ."

S. 45: "(1) In this Act, unless the "context otherwise requires, the following expressions have the meanings hereby respectively assigned to "them, that is to say—. . . 'father', "in relation to an illegitimate infant, "means the natural father; . . . "'guardian', in relation to an infant, "means a person appointed by deed "or will in accordance with the provisions of the Guardianship of "Infants Acts, 1886 and 1925, or by "a court of competent jurisdiction, to "be the guardian of the infant; . . . "'relative', in relation to an infant, "means a grandparent, brother, "sister, uncle or aunt, whether of the "full blood, of the half-blood or by "affinity, and includes—. . . (*b*) "where the infant is illegitimate, the "father of the infant and any person "who would be a relative of the infant within the meaning of this "definition if the infant were the "legitimate child of his mother and "father; . . ."

The mother and her husband appealed.

John Wilmers for the mother and her husband. In the Adoption Act, 1950, the word "parent" means legitimate parent, and accordingly the consent of this father qua parent is not required under section 2 (4) (*a*). In the law of England the father of an illegitimate child has no rights: see Halsbury's Laws of England, 2nd ed., vol. 17, p. 682, note (*e*), that "parent" prima facie means legitimate father or mother and does not include a putative father against whom no affiliation order has been made; that is supported by the Adoption of Children (County Court) Rules, 1952 (S.I. 1952, No. 1258), which have statutory force, having been made under section 8 of the Adoption Act, 1950, and which do not require the consent of the father of an illegitimate child to its adoption unless an affiliation order has been made against him. The Adoption Act, 1950, does not define "parent" (unlike the Children Act, 1948, which by section 59 defined "parent" as "in relation to a child who is illegitimate, "means his mother, to the exclusion of his father"); but the Act of 1950, in section 45, defines "father," and "relative" as including the natural father. Those definitions are significant as in effect excluding him from being a "parent." By section 1 (3) such a father may apply to adopt the infant; if he were a "parent" that provision would not be necessary.

The scheme and purpose of the consents required for an adoption order are contained in section 10, which deprives a parent of all parental rights, obligations, etc., and vests them in the adopters; and it is right and just that such persons should understand the effect of an order and be heard fully. But a putative father has none of those rights, and his consent is not therefore required unless there is in force an order or agreement to maintain the child which brings him in.

There is no authority on the meaning of "parent" in this context; but it was held in *Butler* v. *Gregory*,[2] a case brought under the Prevention of Cruelty to Children Act, 1894, that "parent" did not include the putative father. Prima facie, "child" in English law means legitimate child: *per* Harman J. in *In re A. B. (An Infant)*[3] and *In re Makein, decd. Makein* v. *Makein*,[4] and Vaughan Williams L.J. in *Guardians of Woolwich Union* v. *Guardians of Fulham Union*.[5] "Parent" should be similarly construed: see *per* Cockburn C.J. in *Regina* v. *Brighton Inhabitants*,[6] that "the father of an illegitimate child is not "recognized by the law of England as to civil purposes": *Regina* v. *Chafin*[7]; *Jones* v. *Goodchild*.[8]

A putative father, unlike the mother, has no parental rights. *Rex* v. *Soper*[9] decided that he had no right at common law to custody of a child during its mother's life; and Lindley L.J. in *Regina* v. *Barnardo. Jones's Case*,[10] said that the mother had prima facie the right to custody of an illegitimate child based on her relationship with it and the absence of all superior right in the reputed father or anyone else. The mother's right to custody and her corresponding obligations were established in *Humphrys* v. *Polak*[11] and *In re J. Carroll*.[12] The father has no right to appoint testamentary guardians: *per* Sir William Scott in *Horner* v. *Horner*[13]; *Sleeman* v. *Wilson*.[14] *In re A., decd. S.* v. *A.*,[15] on the wording of the Guardianship of Infants Act, 1925, impliedly shows that the mother has such a right. Under the Second Schedule, Part II, to the Marriage Act, 1949, the mother of an illegitimate infant must consent to its marriage if under 21; the father has no such right. The domicile of such a child is determined by that of its mother: *Udny* v. *Udny*[16]; as is its religious education: *per* Slesser L.J. in *In re J. Carroll*.[17] In *H. (orse. D.)* v. *H.*[18] the father had the actual custody of the child and the court held that his consent was necessary under the Adoption of Children Act, 1926, before an adoption order could be made; but no one had the temerity to argue that he was a

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[2] (1902) 18 T.L.R. 370.

[3] [1954] 2 Q.B. 385; [1954] 2 All E.R. 287.

[4] [1955] Ch. 194; [1955] 1 All E.R. 57.

[5] [1906] 2 K.B. 240, 246; 22 T.L.R. 579.

[6] (1861) 1 B. & S. 447, 451.

[7] (1702) 3 Salk. 66.

[8] (1779) 2 Eq.Ca.Abr. 425.

[9] (1793) 5 Term Rep. 278.

[10] [1891] 1 Q.B. 194, 211.

[11] [1901] 2 K.B. 385, 388–9.

[12] [1931] 1 K.B. 317; 47 T.L.R. 125.

[13] (1799) 1 Hagg.Con. 337, 350, 352.

[14] (1871) L.R. 13 Eq. 36.

[15] (1940) 56 T.L.R. 934.

[16] (1869) L.R. 1 Sc. & D. 441.

[17] [1931] 1 K.B. 317, 356.

[18] [1947] K.B. 463; sub nom. *Harris* v. *Hawkins*, 63 T.L.R. 207; [1947] 1 All E.R. 312.

"parent"; for if he had been so he would not have had to prove that he had the actual custody. *In re A. B. (an Infant)*[19] is distinguishable on the question of parental rights, for there the court was considering equitable rights which are not in the category of parental rights extinguished by section 10.

The practical inconvenience of holding that "parent" includes the putative father should weigh with the court. Such a father's identity is often not known, and is sometimes in dispute. His identity would have to be proved, or an application made in every case to dispense with his consent. That would be contrary to the whole policy of the Act, which is intended to make adoption arrangements speedy, inexpensive and confidential. If "parent" does not include the father of an illegitimate child per se this father cannot object to the making of the adoption order, for he will have no locus standi to be heard on the welfare of the child under section 5 (1) (*b*). The county court judge was satisfied that the adoption was in the child's interest.

F. P. Neill for the father. The doctrines laid down in the old cases that the bastard is filius nullius, and the rules of law which disregard him and pay exclusive attention to the mother of such a child are explicable because the father had often vanished from the scene or was not identified. But it does not follow that "parent" in the Adoption Act, 1950, should be construed to exclude the putative father, for the following reasons: (1) The natural and ordinary meaning of "parent" is a person who has begotten or borne a child, whether legitimate or illegitimate. (2) There is no settled rule that "parent" in a statute means lawful parent. In some Acts, e.g., the Fatal Accidents Acts, "parent" has been defined to include the father of an illegitimate child. In the Legitimacy Act, 1926, "parent" or "the parents" in certain contexts means by necessary implication the parents of an illegitimate child. In the Children Act, 1948, section 59 contained a definition of "parent" as excluding the father of an illegitimate child; but the definition was omitted in the (amending) Adoption Act, 1949, and in the Act of 1950. In every case the courts must construe the word in the context of the particular statute. (3) In so far as there is a rule that "parent" means lawful parent, that meaning is displaced in the Adoption Act, 1950, for its context is that of concern with infants, the majority of whom are illegitimate, and by necessary inference the "parents" contemplated are the parents of illegitimate children.

[19] [1954] 2 Q.B. 385.

See also sections 37 and 38 of the Act, in which the word "parent" does not appear to exclude the father of a bastard. The word "parent" should be construed in a way similar to that in which it is used in the Legitimacy Act, 1926, which was passed in the same year as the first Adoption of Children Act, 1926. *Butler* v. *Gregory*[20] is distinguishable as being a decision on the meaning of "parent" in the Prevention of Cruelty to Children Act, 1894, and does not assist on the present Act, which was passed against a known background of illegitimacy.

[DENNING L.J. Parliament must be taken to have known in 1950 of the decision in *Butler* v. *Gregory*[20] in 1902, which gave to "parent" an interpretation which did not include the natural father; and counsel in that case, Mr. Clarke Hall, who submitted that the word "parent" in the Act of 1894 was intended to be used in a broad sense and not in the strict legal sense, later wrote (in Clarke Hall and Morrison on Children, 4th ed., p. 433) that "parent" did not include the father of an illegitimate child unless an affiliation order had been made against him.]

(4) If, as is evident, "parent" in this Act includes the mother of an illegitimate child, it must also include the father of such a child: *Horner* v. *Horner*[21] is authority for showing that she is a "parent"; and *In re D. X.*,[22] deciding that her consent was necessary for the adoption of such a child, implies that she is a "parent." Authority for the proposition that the father is equally a parent within section 2 (4) (*a*) of this Act is the dictum of Harman J. (recorded in a note taken by solicitors and confirmed by counsel in the case) in *In re Aster (an Infant)*,[23] that the opposition of a putative father would be fatal to an application for adoption. At the least, that decision shows that the father has a right to ask for the custody of the child and ranks second only to the mother.

[ROMER L.J. But the court in its equitable jurisdiction over wards of court will listen to anyone whose views may be helpful on the welfare of the child.]

[BIRKETT L.J. *In re Aster*[24] was reported in the Court of Appeal and I do not think that the present question was in the mind of the court at all.]

(5) If it can be established that the putative father has any

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[20] 18 T.L.R. 370.

[21] 1 Hagg.Con. 337.

[22] [1949] Ch. 320; 65 T.L.R. 210; sub nom. *In re A. B.* [1949] 1 All E.R. 709.

[23] Unreported. December 21, 1954.

[24] [1955] 1 W.L.R. 465; sub nom. *In re A. (An Infant)* [1955] 2 All E.R. 302.

single one of the rights, liabilities, etc., which will be extinguished by section 10 of the Act of 1950 in favour of the adopters, that is enough to establish that he is a "parent" whose consent to its extinction is required. The father has (i) a right in equity during the mother's life to apply to have the child made a ward of court and to have custody given to him: *In re Aster*[24] and *Regina* v. *Nash*, *per* Sir George Jessel M.R.[25]; (ii) if the father has lawful custody, it will be protected against third persons: *Ord* v. *Blackett*[26]; and (iii) after the mother's death the father has a better right than anyone else to the custody of the child: see *In re Kerr*,[27] *In re Crowe (an Infant)*[28] and *In re Connor*,[29] three decisions of the Irish courts which are of strong persuasive authority, showing a clear legal right in the father which is extinguished by section 10 and fixed in someone else. (6) The father has an express right under section 1 (3) of the Act of 1950 to apply to adopt the child; any construction of "parent" which excluded him would thus be very curious in that if he applies to adopt the consent of the mother is necessary, but if the mother applies to adopt his consent is not necessary merely because he is not a "parent." (7) The natural father, who in the present instance has lived with the child and its mother for 12 years and continues to show interest in and affection for it, cannot in justice have any lesser status or right to consent or withhold his consent to its adoption than "a person who is liable by virtue of any "order or agreement to contribute to the maintenance of the "infant," that is, a person who may have sought to evade his responsibilities and against whom proceedings may have had to be taken under the Bastardy Acts, and who by virtue of an adoption order is to be relieved of a financial burden. That could not be the intention of the Act. In *H.* (*orse. D.*) v. *H.*[30] the court took for granted that "parent" included the putative father. "Relative" was defined for the first time in the Adoption Act, 1949.

There would be no practical inconvenience in construing "parent" as including the putative father, for in adoption proceedings, if the guardian ad litem reported to the court that the father was unknown or could not be found, the court has power under section 3 (1) to dispense with the consent.

If the father is held not to be a "parent," it is submitted that the court ought not to make an adoption order but to remit the case for rehearing to the county court so that the father may be heard on the welfare of the child under section 5 (1) (*b*). The court has made him a respondent under powers conferred by rule 9 of the Adoption of Children (County Court) Rules, 1952; but thus far he has been heard only on the legal matter of consent.

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[24] [1955] 1 W.L.R. 465.
[25] (1883) 10 Q.B.D. 454, 456.
[26] (1724) 9 Mod. 116.
[27] (1889) 24 L.R.Ir. 59.
[28] (1883) 17 Ir.L.T. 72.
[29] [1919] 1 I.R. 361.
[30] [1947] K.B. 463.

[ROMER L.J. If he was brought in as a respondent on the misapprehension that he was a "parent" and this court concludes that he is not, he can have no locus standi as a respondent.]

He remains a respondent until he is struck out.

Wilmers in reply. The dictum of Harman J. in *In re Aster (an Infant)* [31] was unconsidered and does not bind this court. The definition of "parent" in the Children Act, 1948, s. 59, is the legal meaning of that word.

[ROMER L.J. "Relative" is defined in the Children Act, 1948, by reference to section 220 of the Public Health Act, 1936, which in turn refers to the Adoption of Children Act, 1926, so that the legislature seems to have dealt with the matter consistently, including "father" in "relative" in the adoption code, and to have fitted it in with the definition of "parent" in the Children Act, 1948.]

Yes; the natural father is expressly included in "relative" and is therefore not within "parent" in either Act. The alleged right of the father to custody after the mother's death is not a parental right, but merely a right protected by the court in its equitable jurisdiction.

[DENNING L.J. The Irish courts regarded it rather as a right in law.]

That is not the position in English law. The Irish decisions relied on conflict with English authorities already cited. Moreover, in *Ex parte Guardians of St. Mary Abbotts* [32] the Divisional Court held that guardians were entitled to recover the custody of children even though the natural father had them in his possession; and in *In re Bates* [33] three judges of the Supreme Court of Victoria decided that the father of illegitimate children had no locus standi to take them by habeas corpus out of the care of a guardian to whom their mother had given them at her death. That is of equal persuasive value with the Irish cases, since Australian law is also based on English law.

[ROMER L.J. But if the Irish decisions are applicable, and the mother died without appointing a testamentary guardian, the father would be entitled to take over the children; that right would be in direct conflict with the rights conferred on adopters by section 10, so that the father's position would surely be worsened?]

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[31] Unreported. December 21, 1954.

[32] (1887) 51 J.P.N. 740.

[33] (1875) 1 V.L.R. 178.

This right of the father, such as it is, is not extinguished by section 10. It only arises because of the death of the person to whom in law the custody belongs, i.e., in the case of an illegitimate child, the mother. The only effect of an adoption order is to substitute the adopters for the mother.

Finally, if the court holds that the putative father is a "parent," then this father is unreasonably withholding his consent to the adoption order being made. The welfare of the child is not the paramount consideration in adoption: see *Hitchcock* v. *W. B. and F. E. B.*[34] and *In re K (An Infant).*[35] The court ought not to send the case back to the county court, involving further delay and expense, for the judge regarded the adopters as perfectly fit to have the child.

If the court holds that the putative father is not a "parent," he cannot claim to be a respondent by virtue of the Rules of 1952, for rules 9, 11 and 13 provide only for a respondent to be heard at the time of appointing the guardian ad litem; and in the present case the guardian ad litem had already been appointed and had reported to the court.

Cur. adv. vult.

July 6. DENNING L.J. stated the facts and continued: The mother and her husband wish to adopt the little girl so as to make her legally their own child. The natural father objects. The question is whether he has any right to object. This depends on whether he is "a parent" of the child within the Adoption Act, 1950. That Act provides in section 2 (4) (*a*) that an adoption order shall not be made "except with the consent of every person "or body who is a parent or guardian of the infant or who is "liable by virtue of any order or agreement to contribute to the "maintenance of the infant." No affiliation order has been made against the natural father and he has never entered into any agreement to contribute to its maintenance. His consent is only necessary if he is "a parent" of the infant.

I must say that if the word "parent" is to be read in its ordinary meaning, I should have thought that the natural father was a parent just as much as the natural mother is: but I do not think that it is to be so read in this Act.

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[34] [1952] 2 Q.B. 561; [1952] 1 T.L.R. 1550; [1952] 2 All E.R. 119.

[35] [1953] 1 Q.B. 117; [1952] 2 T.L.R. 745; [1952] 2 All E.R. 877.

In my opinion the word "parent" in an Act of Parliament does not include the father of an illegitimate child unless the context otherwise requires. This is implied in the decision in *Butler* v. *Gregory*,[1] with which I agree. The reason is that the law of England has from time immemorial looked upon a bastard as the child of nobody, that is to say, as the child of no known body except its mother. The father is too uncertain a figure for the law to take any cognizance of him except that it will make him pay for the child's maintenance if it can find out who he is. The law recognizes no rights in him in regard to the child: whereas the mother has several rights. She has the right to the custody of it during her lifetime until it is 14 years of age; *Humphrys* v. *Polak*[2]: whereas the natural father has no right to the custody of it either during her lifetime (*Rex* v. *Soper*[3]), or after her death (*Ex parte Guardians of St. Mary Abbotts*[4]). (I may say that there are observations in some Irish cases, such as *In re Kerr*[5] and *In re Connor*,[6] which seem to suggest that, after the mother's death, the natural father has the legal right to the custody, but I do not agree with those observations.) The mother has a right by deed or will to appoint a guardian for the child after her death; *In re A., S.* v. *A.*[7]: but the natural father has no such right: *Horner* v. *Horner*.[8] The mother has the right to give or withhold consent to the marriage of the child while under 21, but the natural father has no such right either during the mother's life or after her death; see section 3 of the Marriage Act. 1949, and Schedule II. The natural father has no right at law to succeed on intestacy. He has no rights at all, so far as I can see, though no doubt he can apply for the child to be made a ward of court just as anyone else can. The truth is that the law does not recognize the natural father at all. The only father it recognizes as having any rights is the father of a legitimate child born in wedlock. As Lord Stowell (then Sir William Scott) said long ago: "it is perfectly clear that the only father whom "the law of this country has armed with patria potestas is the "father 'quem nuptiae demonstrant'": see *Horner* v. *Horner*.[9]

Once it is accepted that in an Act of Parliament the word

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[1] (1902) 18 T.L.R. 370.
[2] [1901] 2 Q.B. 385.
[3] (1793) 5 Term Rep. 278.
[4] (1887) 51 J.P.N. 740.
[5] (1889) 24 L.R.Ir. 59.
[6] [1919] 1 I.R. 361, 390.
[7] (1940) 56 T.L.R. 934.
[8] (1799) 1 Hagg.Con. 337, 355.
[9] Ibid. 351.

"parent" prima facie does not include the natural father of an illegitimate child, I ask myself whether the context otherwise requires. The answer is that in this Act of 1950 it does not so require. Everything points to the word "parent" being used in its legal sense so as to exclude the natural father. Thus, (i) the Act has classed the natural father as a "relative" and not as "a parent." That appears from section 45, which says that "relative" includes, when the infant is illegitimate, the father of the infant. (ii) If the natural father has had an affiliation order made against him, or has agreed to contribute to the maintenance of the infant, his consent is necessary under the Act; but that is because of the order against him or his agreement. It is not because he is a "parent." (iii) Section 10 of the Act of 1950 extinguishes the rights of the "parents" in the child: if the natural father had any rights, the section would go to show that he was a parent: but as he has no rights, it goes to show that he is not a "parent." (iv) The Adoption of Children (County Court) Rules made by the Lord Chancellor in 1952 (S.I. 1952, No. 1258) proceed on the footing that the consent of a natural father is not required unless an affiliation order has been made against him.

In my opinion, therefore, the natural father has no right to object to this adoption. His consent was not required, and the judge was wrong in thinking that it was.

There is only one further point. It was suggested that the natural father is still a respondent to the application and should be heard on the merits of the adoption order. I do not think this is correct. He was only added as a respondent because it was thought that his consent was necessary. Now that it is found to be unnecessary he disappears from the scene.

It is reasonably plain that the judge would have made an adoption order except for his erroneous belief that the consent of the natural father was necessary. Now that it is seen to be unnecessary we should, I think, make an adoption order. The appeal should be allowed and an adoption order made.

BIRKETT L.J. stated the facts and continued: Mr. Wilmers on behalf of the mother and her husband raised two points: (1) that the father of an illegitimate child was not a "parent" within the meaning of the Adoption Act, 1950, and (2) if he was to be regarded as a "parent" his withholding of his consent in the present case was unreasonable. If the first submission was good in law, the second point did not arise.

The Adoption Act, 1950, in section 2 (4) defined the persons whose consent was necessary to be obtained before an adoption order could be made; and it stated that "except with the consent "of every person . . . who is a parent or guardian of the infant "or who is liable by virtue of any order or agreement to contri-"bute to the maintenance of the infant" no adoption order should be made.

The county court judge had himself taken the view that the father of the child must give his consent, presumably on the ground that he was a "parent" within the meaning of the subsection.

Nowhere in the Act is the word "parent" defined. It is profitless to speculate on the reason for this omission. It may be said that as the rest of the Act makes it quite plain that the father of an illegitimate child cannot be a "parent," it was not necessary to define the word with more precision. But that it is not quite plain is evident from the fact that Mr. Neill was able to present so attractive an argument.

In the Children Act, 1948, s. 59, the word "parent" is defined as follows: "'Parent' (b) in relation to a child who is "illegitimate, means his mother, to the exclusion of his father." But in the Adoption Act, 1950, it was apparently not thought necessary or expedient to make any definition. The ordinary sense in which the word "parent" is used in everyday life is to describe a father or a mother. But a word may take on a particular meaning according to the context in which it is used, and the subject-matter of the statute in which it is used. For example, in *Butler* v. *Gregory*[10] the father of an illegitimate child had been summoned under section 23 of the Prevention of Cruelty to Children Act, 1894. He was summoned as a "parent" and one who was presumed to have the custody of the child in question. But the Divisional Court dismissed the summons on the ground that the father of an illegitimate child was not the "parent" of the child within the meaning of the section. Mr. Clarke Hall, later to be known as a great authority on the law relating to children, submitted for the prosecution that the section must be interpreted "in a broad sense and "not in a legal sense,"[10] and thereby tacitly admitted that if the section was construed in a legal sense the prosecution must fail, on the ground that the father of an illegitimate child was not the parent in the legal sense at all. The definition in the

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[10] 18 T.L.R. 370.

Children Act of 1948 previously quoted follows the law in *Butler v. Gregory*[10] in excluding the father from the definition of "parent."

Furthermore, in section 28 of the Adoption Act, 1950, reference is made to the "placing of an infant . . . in the care "and possession of a person who . . . is not the parent or "guardian or a relative of the infant." In section 45 of the Act, which is the definition section, when "relative" is defined it is said to include "(*b*) where the infant is illegitimate, the father "of the infant . . ."; "guardian" is defined in section 45; "relative" is defined in the same section; but "parent" is not defined. But it seems to be clear that "parent" or "guardian" or a "relative" of the infant refer to three distinct persons, and if the father of an illegitimate child was a "parent" there would be no need to include him in "relative" as section 28 has done. In Sir William Clarke Hall's book on children, (Clarke Hall and Morrison on Children) (4th ed.), it is said (at p. 433): "This Act" (the Adoption Act, 1950) "gives no definition of "the word. Primarily 'parent' means a legitimate father or "mother and does not (apart from statute) include the natural "father of an illegitimate child. . . . The mother of an illegitimate "child is its parent and for the purposes of the Adoption Act "she is its only parent." Again, the use of the words "parent" and "guardian" and "person who is liable by virtue of any "order or agreement to contribute to the maintenance of the "infant" would seem to emphasize once more the fact that the father of an illegitimate child is not a "parent" because a person adjudged to be the putative father becomes a person liable to contribute to the support of the infant, and is thus in a special category.

In section 3 of the Adoption Act, 1950, which gives power to the court to dispense with the consents required by section 2 (4) (*a*) the distinction is made again between "parent" and "guardian" and "person liable by virtue of an order or agree-"ment to contribute to the maintenance of the child." Section 40 (1) (*a*) of the Act makes the same distinction.

Mr. Neill made several submissions to the court in the course of his interesting argument, and the chief points may be summarized in this way. He submitted: (1) That the word "parent" in its ordinary meaning is a person who has begotten or borne a child, and there is no settled rule of law that "parent" in any statute means a lawful parent: and if there be any such rule it can be displaced by the context in which the word "parent" appears. (2) If "parent" includes mother, it must include father. (3) The father of an illegitimate child has certain rights, and apart from this, section 1 (3) of the Adoption Act, 1950, conferred the express right there mentioned on the father.

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[10] 18 T.L.R. 370.

In my opinion these submissions fail. The word "parent" must be construed in the light of the sections of the Act itself, and the various sections I have cited all seem to me to point unmistakably to the fact that the father of an illegitimate child cannot be a "parent" within the meaning of the Act. The rights of the mother of the child have been considered by Denning L.J. and I will not repeat the account of them. It only remains for me to say that the argument that the natural father had some right to object to this particular adoption, and that his consent was necessary, and that he was not withholding his consent unreasonably is not an argument of any validity. Section 3 (1) (*c*) reads: "in any case, that the person whose consent "is required . . . is incapable of giving his consent or that his "consent is unreasonably withheld."

I am clearly of opinion that the consent of the father of an illegitimate child is not required, and that in the present case the father of the illegitimate child is not a person liable by virtue of an order or agreement to contribute to the maintenance of the infant and therefore his consent is not required under that head. The question of whether the consent is unreasonably withheld therefore does not arise. The county court judge mistakenly supposed that the consent of the father of an illegitimate child was necessary before an adoption order could be made. He made a careful note for the assistance of the court, and it was plain that he insisted on the consent of the father of the illegitimate child being obtained, and in the absence of such consent he said that he felt bound to refuse to make the adoption order because the father did not desire "to abandon his parenthood," as the judge expressed it. The child was being properly looked after by the mother; there was no complaint to be made about the mother's husband, and the judge was satisfied that the child was being well looked after. In these circumstances I would allow the appeal and make the adoption order asked for.

Romer L.J. By section 59 of the Children Act, 1948, the term "parent" is defined, for the purposes of the Act, as meaning in relation to an illegitimate child "his mother to the "exclusion of his father." There is no definition of "parent" in the Adoption Act, 1950, but the interpretation section of that Act, section 45, contains a definition of "father" which does not appear in the Children Act, 1948, namely, "in relation to an "illegitimate infant, means the natural father." Both Acts define "relative," but whereas the Act of 1950 includes in that expression the father of an illegitimate infant, the Act of 1948 did not—although it does now, by reason of section 13 (2) of the Adoption of Children Act, 1949. It is not easy to understand why the legislature did not define "parents" in the Adoption Act, 1950, although it had thought proper to do so in the Children Act, which had been passed only a short time previously; and having regard to the obvious importance of the part which "parents" play in relation to the adoption of their children the omission of a definition in the Act of 1950 is the more surprising. It is this omission which has given rise to the main question in this case, namely, whether under section 2 (4) (*a*) of the Adoption Act, 1950, the consent of a father is required to the adoption of his illegitimate child.

In the absence of a definition of "parent" in the Act of 1950 an argument which is not without strength can be advanced, and was advanced before us by Mr. Neill, in support of the view that a putative father is a "parent" for the purposes of section 2 (4) (*a*) of the Act. I will summarize the points on which Mr. Neill's contention was based, without elaborating them at any length. (1) By analogy to the general principle that the word "child," when used in a statute, deed, will or other instrument, is confined in our law to a child lawfully begotten, so also is the word "parent" confined to the father or mother of legitimate children. But in an Act such as the Adoption Act, which is bringing within its ambit children generally, whether legitimate or illegitimate, the presumption is that the term "parent" should also be correspondingly widened. (2) This presumption is fortified by the undeniable fact that the mother of an illegitimate child is put by the Act on the same level as the mother of a legitimate child; both are "parents" for the purposes of the Act. (3) The legislature has thus shown that in speaking of "parents" it was departing from the strict signification of lawful parents; and if the mother of a bastard is brought within the category of "parents" it would be illogical to suppose that Parliament was giving to the expression a hybrid interpretation which would exclude the natural father. (4) The illogicality of this supposition is further demonstrated by the fact that by reason of the definition of "father" Parliament was expressly conferring on a putative father the right to apply for the adoption of his natural child. Having regard to this recognition of his status under the Act it would be curious that he should have no voice whatever in the matter if an adoption order was being sought by somebody else. (5) The contrary view would lead to unexpected results. For example, if the mother and the natural father of a child made more or less simultaneous applications for its adoption, the consent of the mother, as a "parent," would be required on the father's application, but his consent would not be required on hers. (6) The consent of a father who is so heedless of his moral obligations that an affiliation order has to be made against him is requisite to the adoption of his natural child notwithstanding that he would benefit from the adoption in that it would usually result in the cesser of all liability under the affiliation order (section 12). In these circumstances it would be surprising if the views and wishes of a father who voluntarily undertakes the maintenance of his illegitimate child should be disregarded. (7) There are other sections of the Act in which the word "parent" was apparently not intended to exclude the father of a bastard. For example, section 37 makes it a criminal offence for (inter alia) a parent of an infant, except with the sanction of the court, to receive any payment or other reward in consideration of the adoption of the infant under the Act; and section 38 prohibits advertisements indicating that the parent of an infant desires to cause the infant to be adopted. It was suggested (and it is not necessary to express any decided opinion on it), that a putative father who received a reward on the adoption of his natural child, or who advertised his desire to have the child adopted, could not escape prosecution under these sections on the ground that he was not a parent of the child. (8) In defining "parent" in the Children Act, 1948, the legislature thought it necessary to exclude expressly the father of an illegitimate child; and no such exclusion appears in the Act of 1950.

It must be conceded in my opinion that the collective force of these submissions cannot lightly be disregarded. It is, however, in my judgment more than neutralized by two considerations. The first is that the consents referred to in section 2 (4) (*a*) of the Act are, in my judgment, essentially linked with the transfer of rights which results from an adoption order under the provisions of section 10. Upon such an order being made, all the rights, duties, obligations and liabilities of the parents in relation to the adopted infant pass automatically from them to the adopters; and it accords with ordinary principles of natural justice that no person is to be deprived of rights without having an opportunity of being heard. The mother of an illegitimate child has both rights and obligations towards it (see, for example, *Barnardo* v. *McHugh* [11] and *Humphrys* v. *Polak* [12]), and it therefore follows that she should not be subjected unheard to the operation of section 10. The father of a bastard, however, has under our law no rights in respect of it at all, and to the best of my belief he never has had. "The father of an illegitimate child is not recog-"nized by the law of England as to civil purposes; but in that it "differs from the law of other countries" (*per* Cockburn C.J. in *Regina* v. *Brighton Inhabitants* [13]). Certain Irish cases were cited to us in which the view was taken that a putative father has rights, subordinate only to those of the mother, which the courts will recognize and enforce; that view does not, however, in my judgment accord with the law of England. I am of opinion, therefore, that a father is not deprived by section 10 of the Act, on the adoption of his natural child, of any rights, for he has no rights upon which the section could operate. It was suggested by Mr. Neill that even assuming that such a father has no rights at common law he is possessed of rights which would be recognized in the exercise of the equitable jurisdiction over wards of court. In my opinion this is not so. If the natural child of a man were to become a ward, the court would certainly permit the father to express his views and wishes on matters affecting the welfare of the child and would give effect to them if it thought that they were best calculated to promote the interests of its ward; but he has no right of audience in these matters which gives him precedence over other people, and effect will certainly not be given to his wishes with regard to the infant merely because he is its natural father. Section 10 of the Act of 1950 is concerned with "rights" and in my opinion such locus standi as a man possesses with regard to any natural child of his who becomes a ward of the Chancery Division falls very far short of qualifying as a "right." In my judgment, therefore, a putative father is in no way affected by the operation of section 10 of the Adoption Act, 1950, in that he is not deprived of any rights by an adoption order made in relation to his illegitimate children, and this in itself constitutes a very cogent reason for rejecting the view that his consent to the adoption, as a parent, is required.

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[11] [1891] A.C. 388; 7 T.L.R. 726.

[12] [1901] 2 K.B. 385.

[13] (1861) 1 B. & S. 447, 451.

A second reason, equally cogent in my opinion, is that he is expressly brought, by section 45 of the Act, within the definition of "relative." As I have indicated earlier, the definition of "relative" in the Children Act, 1948, did not originally include the father of an illegitimate child, and the inclusion of such a father in the category of relatives for the purposes of the Adoption Act, 1950, is a consideration of important significance. If in fact a putative father was intended to share in the rights which the Act confers on "parents" it is difficult in the extreme to perceive any reason why he should have been expressly included in the subordinate class of "relatives." In my judgment, the inference, and the only legitimate inference, from such inclusion is that his status, for the purposes of the Act, was to be that of a relative of an adoptive child and nothing more.

These considerations far outweigh, in my opinion, those on which Mr. Neill relied, and which I have already summarized, and lead inevitably to the conclusion that the father of an illegitimate child is not, per se, a "parent" within section 2 (4) (*a*) of the Adoption Act; from which it follows that an order for the adoption of the child can be made without his consent.

It was alternatively contended on the father's behalf that, even so, he is entitled to present his views on the desirability or otherwise of the proposed adoption in the present case on the ground that he was made, and still is, a respondent to the summons. This appears to me to be an untenable proposition. He was only made a respondent because of the mistaken belief that his consent was required as a "parent"; now that this impression has been shown to be unfounded he has no locus standi to intervene in the matter at all. I accordingly agree that the appeal should be allowed and that as the county court judge expressed his approval of the adoption and of the suitability of the applicants we ought to make the order for which they ask.

*Appeal allowed. Adoption order made.
Leave to appeal to the House of Lords refused.*

Solicitors: *Jaques & Co. for Mary E. Sykes & Co., Huddersfield; Vizard, Oldham, Crowder & Cash for Whitfield, Son & Hallam, Dewsbury.*

M. M. H.

REGINA *v.* ABBOTT.

C. C. A.

1955
July 12.

Lord Goddard C.J.,
Finnemore and Devlin JJ.

Criminal Law—Court of Criminal Appeal—Appeal against conviction —Prosecution for forgery—Two accused—No evidence at close of case for prosecution against one accused—Submission of no case wrongly overruled—Incriminating evidence given by other accused —Right of Court of Criminal Appeal to allow appeal—Other evidence not to be taken into consideration.

Criminal Law—Submission of no case.

The appellant and another were indicted together for forgery. At the close of the case for the prosecution a submission was made on behalf of the appellant that there was no evidence against him fit to go to the jury. The trial judge rejected the submission and refused to withdraw the case from the jury, although the prosecution had then established no case against the appellant. Evidence was then given by the other accused incriminating the appellant. The appellant and his co-defendant were convicted. On appeal against conviction:—

Held, that the appellant was entitled to have his appeal allowed as the judge had come to a wrong decision in point of law in rejecting the submission of no case and in leaving the case to the jury when there was no evidence against him at the close of the case for the prosecution. In those circumstances the Court of Criminal Appeal was not obliged to take into account the adverse evidence given against him when the case was wrongly left to the jury.

Rex v. *Cohen and Bateman* (1909) 2 Cr.App.R. 197 applied.

Rex v. *Power* [1919] 1 K.B. 572; 35 T.L.R. 283 explained.

APPEAL against conviction.

The appellant, Charles Clement Abbott, and a woman named Ruth Wales, were tried before Glyn-Jones J. at Manchester Assizes upon an indictment which charged them with forgery of a valuable security, namely, a receipt for £2,415, obtaining money by false pretences, and conspiracy to defraud the Refuge Assurance Company.

Some few years before the events leading to the trial the appellant's wife, Mary Alys Abbott, had taken out an insurance policy for the sum of £10,000, and the annual premiums of £900 were paid by the appellant. Three premiums having been paid, the policy was converted into a free policy. In 1954 the appellant and his wife separated, the wife going to live in Jersey while the appellant continued to live in Leigh, Lancashire, at his house known as "The Lingards." He also had an office in Leigh where Ruth Wales was employed as his secretary. The evidence of one Burns, the branch manager of the insurance company in Leigh, and the chief witness for the prosecution, was, in effect, that in June, 1954, an inquiry was received in the Leigh office of the insurance company regarding the surrender value of the policy. On June 18 he (Burns) telephoned to "The "Lingards," asked for Mrs. Abbott, and a conversation took place between him and a woman purporting to be Mrs. Abbott with regard to the surrender of the policy and the payment over of its value in cash. Having made inquiries from his head office he again telephoned "The Lingards" on June 29 and was informed by Mrs. Warburton, a daily help, to whom he spoke on that occasion, that Mrs. Abbott was away. He telephoned again on July 5 or 6, when a conversation to the following effect took place. The conversation was initiated by him, and he asked to speak to Mrs. Abbott. The person who answered the telephone said that Mrs. Abbott was away but "Mr. Abbott is at hand, "would you like to speak to him?" A male voice then spoke to him (Burns) and a conversation took place as a result of which he attended at "The Lingards" on July 15, where he met Ruth Wales and paid over to her the sum of £2,415 in cash. Ruth Wales signed a receipt for the money in the name of Mary Alys Abbott. There was no question that the telephone call had taken place on July 5 or 6. Moreover, Burns was unable to say that it was in fact the appellant who had spoken to him.

The case for the prosecution against the appellant Abbott centred upon the fact that he was a party to the telephone conversation of July 5 or 6 in which it was arranged that the policy should be surrendered and the money paid over, but it transpired from the evidence of Mrs. Warburton, who was called for the prosecution, that the appellant was away in Torquay on the material date.

At the close of the case for the prosecution counsel for the appellant submitted that there was no evidence against the appellant to go to the jury, but that submission was rejected by the judge after calling on counsel for Ruth Wales to reply. Both Ruth Wales and the appellant gave evidence, and while the appellant gave no direct evidence against himself Ruth Wales stated that she gave the receipt and took the money on the appellant's authority on the understanding that it was to be sent to Mrs. Abbott in Jersey.

Glyn-Jones J. said in the course of his summing up: "It is "perfectly true . . . it is not enough for the prosecution . . . to "say 'Here is a swindle. One or other of these accused has "'committed that swindle, but we, the prosecution, do not know "'which and we will leave it to you to decide.' The burden "remains on the prosecution to prove to you who did it and "if . . . at the end of this case you were left in real doubt as "to which of these two is guilty, you would have to acquit both, "but for a reason which I will state . . . I see no ground upon "which you can possibly arrive at that conclusion, and I will "tell you why . . ."

Later he said: "I regret to say I cannot see in this case "any ground upon which I can honestly advise you that you "may acquit them both. It seems to me abundantly clear that "the insurance company were swindled. Mrs. Wales' defence "is 'I did this innocently.' If she is right, it follows that "you would be satisfied that Mr. Abbott was the guilty party. "If she did not do it innocently, then either she alone is guilty "or both of them are guilty together. So my suggestion to "you is that only three verdicts, acting with commonsense, are "open to you: both guilty; Abbott guilty, Mrs. Wales not guilty; "or Mrs. Wales guilty and Abbott not guilty."

In considering specifically the case against the appellant, Abbott, the judge said: "The case against Mr. Abbott as it "was opened to you by Sir Godfrey Russell Vick depended "almost entirely on the conversation [of July 5 or 6] between "Mr. Burns and Mr. Abbott . . ." He referred to the evidence relating to that conversation which, he said, "seems to me to "prove beyond the slightest shadow of doubt, to prove conclusively, that Mr. Abbott was not in Leigh between Saturday, "July 3, and Saturday, July 10 . . . The invitation addressed "to you by Sir Godfrey Russell Vick that it must have taken "place on some other day cannot be accepted because there was "no other day into which it could be fitted." He then said: "It seems to me that the foundation upon which Sir Godfrey "Russell Vick opened the case against Mr. Abbott has crumbled "completely away and there is nothing left of it." The judge then went on to refer to other evidence for the prosecution that the appellant had denied at the first interview with the police that he knew Mr. Burns, and that he had afterwards corrected himself and said that he remembered he had spoken to Mr. Burns. He then said: "I have told you . . . the whole "of the direct evidence against Mr. Abbott on which the prosecution when they began this case relied, and I tell you now "that if there had been no more against Mr. Abbott in this "case than that, having regard to what was said by Mrs. "Warburton as to his being away from June 26, I should have

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"been disposed to say to you that I did not think this case "against Mr. Abbott should go to the jury . . . But there is a "case against him which is fit for your consideration, and I am "going to tell you what I think it is."

The judge then referred to the fact that, when Mrs. Abbott went away, she left her policy behind her, and that it was under the control of the appellant, and also to the fact that he had access to a telephone book in which entries were made by his personal secretary, Mrs. Wales, that she had twice telephoned the Refuge Assurance Co. He said: "You may think that those "facts . . . do call for an explanation, that the least he can be "called upon to do is to go into the witness-box and say, 'I "'know nothing about this. The entry that has been made "'in my books was made without my knowledge. I never saw "'it. I never knew what was going on, and this woman has "'stolen the policy from my custody and behind my back has "'swindled the insurance company.' And that is exactly what "he has gone into the witness-box and said."

He then said that the question for the jury was: "Was this "man speaking the truth? Was he the honest innocent man, "or was he saying what was not true? Was he lying?", and later: "That is why it seems to me . . . the very crux of the "case is for you to make up your minds whether during all the "time when he was giving evidence before you he was telling you "lies about material matters in this case or was he speaking "the truth?", and finally, "if you think Mrs. Wales honestly "and genuinely believed that Mr. Abbott wanted this money "to send to his wife in Jersey, even though it was in cash, you "can acquit her; but . . . it will follow from that finding that "you are satisfied that he told her what to do, and you will "convict him. But if, having looked at the demeanour of "both these people, having listened to what they have said, "you come to the conclusion that both have lied to you and "that both in fact were parties to this swindle well knowing that "Mrs. Abbott was not going to get the money, why, then, you "may well think it is your plain duty to convict them both."

Both the appellant and Ruth Wales were convicted of forgery and the jury were discharged from giving a verdict on the other counts on the indictment.

The appellant appealed on the ground, inter alia, that at the close of the prosecution's case there was no evidence fit to be left to the jury, and that the judge was wrong in refusing to withdraw the case.

A. P. Marshall Q.C. and *F. G. Paterson* for the appellant. There was no evidence against the appellant at the close of the case for the prosecution and therefore the judge should have stopped the case against him. The judge was wrong in rejecting the submission of no case and in calling upon counsel for Mrs. Wales to reply. It was apparent from the start of the case that Mrs. Wales' task was not so much to exculpate herself as to implicate the appellant. It is true that since the decision in *Rex* v. *Power*[1] the Court of Criminal Appeal is not precluded from considering evidence given against a prisoner after a judge has wrongly left his case to the jury, but it is submitted that if there is a scintilla of doubt whether injustice has been done the court ought not to uphold the conviction.

[LORD GODDARD C.J. The Criminal Appeal Act, 1907, gives this court power to quash a conviction if on any ground there has been a miscarriage of justice.]

[DEVLIN J. The whole point of the argument in *Power's* case[1] was whether the court was bound to consider the evidence. There might well be a difference between cases where there is a doubtful point for the judge to decide and cases where he wrongly allows a case against one prisoner to continue and another prisoner gives evidence against him. It would be wrong for the court to take that evidence into account.]

Here there was in fact a miscarriage of justice. It is clear from the judge's summing-up that the onus was put upon the defence.

[He was stopped.]

Sir Godfrey Russell Vick Q.C., *C. T. B. Leigh* and *Michael Scholfield* for the prosecutor. The question is whether the prosecution, on the facts of this case, ought to adopt the attitude that the verdict was wrong and that there has been a miscarriage of justice. It is submitted that there was evidence at the close of the case for the prosecution sufficient to allow the case against the appellant to go to the jury and therefore the judge was right in rejecting the submission of no case. Even if he were wrong, the Court of Criminal Appeal is bound to look at the whole of the evidence in the case when considering whether to quash the conviction: *Rex* v. *Power*.[1]

[DEVLIN J. *Rex* v. *Power*[1] decided that the court is not bound to disregard the evidence. You are submitting that the court is bound to look at the whole of the evidence.]

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[1] [1919] 1 K.B. 572; 35 T.L.R. 283.

[FINNEMORE J. It is clear from the argument of Mr. Eustace Fulton for the Crown in *Power's* case [1] that some stolen property was found in the prisoner's possession. The court did not deal with the position where there was no evidence against a prisoner.]

When one looks at the whole of the evidence in the present case it is abundantly clear that the appellant knew of the fraud that was being carried on. The jury saw him in the witness box and decided that he was lying. The moment Mrs. Wales gave evidence there was evidence against him, and the jury must have accepted her evidence. *Power's* case [1] shows that the Court of Criminal Appeal has a discretion, and if, having examined the whole of the evidence, the court is of the opinion that the conviction should be quashed it may do so.

[DEVLIN J. If the court is against you on your submission that the judge was right not to stop the case then the appellant was convicted on an error of law. If it had not been for that error of law he would have been entitled to leave the dock.]

If a judge makes an error in law *Power's* case [1] decides that the whole of the evidence is available for the Court of Criminal Appeal to decide whether justice was done. If this court, having looked at the evidence, finds that there is evidence against the appellant from the person who knew everything about the fraud, namely, Mrs. Wales, it would not be right to ignore that evidence and to say that the trial was not properly conducted.

[Lord Goddard C.J. referred to *Rex* v. *Cohen and Bateman.*[2]]

Marshall Q.C. was not called upon to reply.

LORD GODDARD C.J. stated the facts, reviewed the evidence for the prosecution, and continued: All the members of the court are of the opinion that at the close of the case for the prosecution there was no evidence against the appellant, and that was the opinion of the judge, because when he came to sum up to the jury he stated that that was his opinion. He then went on to say why, in all the circumstances, he thought it right to leave the case to the jury.

Then happened what would be expected to happen. Not only did the appellant give evidence denying that he knew anything about it, but he insisted that he knew nothing about it. He may in some respects have made an unsatisfactory witness and the jury might have taken an unfavourable view of him as a witness, but he did not supply any direct evidence against himself that he had any part in this fraud. When Mrs. Wales went into the witness-box she placed the whole of the blame on him. She had received the money and signed somebody else's name on the receipt, and unless she could show circumstances which would lead the jury to suppose that she was doing that without intent to defraud she might just as well have pleaded guilty. The jury convicted both.

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[1] [1919] 1 K.B. 572; 35 T.L.R. 283.

[2] (1909) 2 Cr.App.R. 197.

Reliance is placed by the prosecution on the decision of this court in *Rex* v. *Power*[1] for this purpose: it is said that if a judge wrongly overrules a submission of no case and allows the case to go to the jury and accused persons give evidence and one gives evidence against the other, this court is not bound to say that it will quash the conviction because it may take into account the whole of the evidence given. But *Rex* v. *Power*[1] did not decide that if there was no evidence against a man who was indicted together with another person it was right to allow the case to go to the jury against that man, or that, if there was no evidence against him, it was other than a wrong decision in law.

I think that what possibly led the judge to act as he did when he was of opinion that there was no evidence against the appellant was that he had in mind that the jury could not say in the present case: "We find a verdict of not guilty against both "because we are not satisfied as to which was guilty, if one of "them was." With great respect to the judge, that is not the law. If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case. If, in those circumstances, it is left to the accused persons to get out of it if they can, that would put the onus upon them to prove themselves not guilty. Finnemore J. remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time when the murder was committed; but the prosecution could not show that either sister A or sister B had committed the offence. Probably one or the other must have committed it, but there was no evidence to show which. and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and the law maintained that the prosecution should prove its case. If the judge, as we think is clear from his summing-up to the jury, had in his mind that he could not allow the jury to be left of the opinion that they could not acquit both the appellant and Mrs. Wales, with all respect to the judge we think that he was wrong. No doubt he felt, having that view in mind, that if he stopped the case against the appellant he would then have to say to the jury: "You must "convict Mrs. Wales because, as I have told you, one or the "other must have done it and, as there is no evidence against "this man, Mrs. Wales has done it." That was not the line the judge should take. If there was no evidence against the appellant he was entitled to be acquitted and to leave the dock. The jury would then still have to decide whether they were satisfied that Mrs. Wales committed the offence. They would hear her defence and they might think that it was the appellant who committed the offence. If the jury did not believe that, but if they did believe that Mrs. Wales signed the receipt without the appellant's authority although she did so in the honest belief that in what she was doing she was not acting fraudulently but for the benefit of Mrs. Abbott, she would be entitled to be acquitted. If, on the other hand, the jury came to the conclusion that she signed the receipt without authority and that her story was totally untrue, then the prosecution had proved a case against her; and it is only fair to the appellant to point out that the jury could not have accepted Mrs. Wales's evidence because the jury convicted her although she endeavoured to put the whole burden on the appellant.

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[1] [1919] 1 K.B. 572.

The question, therefore, is whether the case of *Rex* v. *Power* [1] obliges us to take a different view and to say that as the judge, although in our opinion wrongly, allowed the case against the appellant to go to the jury, we must uphold the conviction because Mrs. Wales did give evidence against him. The case to which I called attention during the course of the argument was *Rex* v. *Cohen and Bateman.*[2] The judgment of Channell J. in that case has often been treated in this court as a classic judgment on the construction of section 4 (1) of the Criminal Appeal Act, 1907. The judge said [3]: "Taking section 4 with its "proviso, the effect is that if there is a wrong decision of any "question of law the appellant has the right to have his appeal "allowed, unless the case can be brought within the proviso. In

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[1] [1919] 1 K.B. 572.

[2] (1909) 2 Cr.App.R. 197.

[3] Ibid. 207.

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"that case the Crown have to show that, on a right direction, the "jury *must* have come to the same conclusion." The question of the proviso does not arise in this case. Here we have a question whether or not there was a right decision in point of law by the judge. In our opinion the judge ought to have said at the end of the case for the prosecution that there was no evidence against the appellant Abbott, and therefore he was wrong in law in giving the decision he did. The rest of *Cohen and Bateman's* case[3] concerns the case where the judge in some way wrongly deals with the facts, and I need not read it for the purposes of this case.

It is then said that *Rex* v. *Power*[4] has given a different interpretation to section 4 of the Criminal Appeal Act. There is no question that in *Power's* case[4] a submission had been made on behalf of an appellant to the Commissioner at the Central Criminal Court which he overruled. Both prisoners went into the witness-box; one prisoner gave evidence against the other, and certainly supplied a great deal of evidence against the appellant. The court in that case actually quashed the conviction on the ground that the summing-up was entirely defective and had not put the appellant's case to the jury at all. That was the decision of the court, and it is rather remarkable that in the report in The Times Law Reports[5] that is the point which is reported, the point concerning the giving of evidence by one prisoner against the other not being dealt with at all. But what the court desires to point out with regard to *Power's* case[6] is this: the court was not pronouncing upon whether the judge ought to have stopped the case at the end of the case for the prosecution; and it is observable that Mr. Eustace Fulton, arguing for the Crown, submitted that there was some evidence given by witnesses for the prosecution: "There was evidence given by witnesses for "the prosecution that some of the stolen property was found "in the possession of the appellant." Whether the court was dealing with the case on the footing that there was no evidence against Power, we do not know. What was said was that, if the case did go to the jury, the evidence given by the prisoners respectively was part of the sum of the evidence in the case, and this court when asked to quash a conviction might take the whole of the evidence into account. They did not say that the court must do so, but that this court might do so. They certainly did not say that if there was no evidence given against one of two or

[3] (1909) 2 Cr.App.R. 197, 207.
[4] [1919] 1 K.B. 572.
[5] (1919) 35 T.L.R. 283.
[6] [1919] 1 K.B. 572.

more prisoners the judge could simply leave the case to the jury to see whether, when the case for the defence was opened, one or other of the prisoners would support the case set up by the prosecution.

Another point which it seems to me it is necessary to take into consideration in deciding the present case is that, with all respect, it cannot be right for a judge to leave a case to the jury where the whole of the structure upon which the prosecution has been built up to that moment collapses and falls, for that is what happened in this case. Once it was shown that neither Mrs. Warburton nor the appellant could have taken part in the telephone conversation upon which the whole of the case for the prosecution was built, it seems to me that it was not only the duty of the judge to point out, but that it was the prisoner's right to say, that the case against him had collapsed, and that he was not called upon to answer the case any further. It is putting the onus on the prisoner to say "You go into the witness-box and satisfy the "jury that you did not have any of this money." The appellant was kept in the dock with his fellow prisoner; she had still to give evidence, and she had a very strong case to answer. Her answer was to try to put the blame on the appellant.

For these reasons the court has come to the conclusion that the verdict cannot stand on any standard that it can apply. Therefore, the appeal is allowed, the conviction is quashed and the prisoner is discharged. We shall order that there be no further prosecution on this indictment.

Appeal allowed.

Solicitors: *A. Bieber & Bieber; Cyril C. Harrison, Manchester.*

E. M. W.

C. A.

1955
July 7, 8.

Denning, Birkett and Romer L.JJ.

NATIONAL ASSISTANCE BOARD *v.* PARKES.

Husband and Wife—Maintenance—Agreement—Agreement to separate —Agreement by wife not to claim financial provision from husband —No matrimonial offence by wife—Wife in receipt of assistance from National Assistance Board—Liability of husband to maintain wife—National Assistance Board entitled to bring husband before court—Duty of court to have regard to all the circumstances— Court's discretion to exempt from liability to repay to board sums paid to wife who has committed matrimonial offence—National Assistance Act, 1948 (11 & 12 *Geo.* 6, *c.* 29), *ss.* 42 (1), 43 (1) (2).
National Assistance.

A husband and wife parted by consent under a separation agreement, by which the wife covenanted that she would not at any future time be or claim to be entitled to any financial provision whatsoever from the husband. Later the wife became destitute and received assistance from the National Assistance Board, which preferred a complaint under section 43 of the Act against the husband, as a person liable to maintain the person assisted:—

Held, that the existence of a separation agreement for no maintenance was not a bar to the board's claim against the husband under the Act. A separation agreement, whether for fixed, or insufficient, or no maintenance, did not relieve a husband of his obligation to maintain a wife. If the wife had not been guilty of any matrimonial offence and later fell into need and the husband had notice of such need and the means to maintain her, he was under a duty to do so. A fortiori, the existence of such an agreement could not shift on to the community the liability of the husband under the Act to maintain his wife.

Per curiam. There is no difference in principle between a separation agreement whereby the husband agrees to maintain his wife wholly or in part, and an agreement whereby it is agreed that he shall pay her nothing.

Tulip v. *Tulip* [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91 applied.

Per curiam. Since section 42 (1) (*a*) provides that a man shall be liable to maintain his wife, the board may bring any husband of an assisted wife before the court under section 43 (1), but once he is before it, the court (by section 43 (2)) "shall have regard "to all the circumstances" including any circumstance recognized by the law as sufficient to relieve a husband of his obligation to maintain his wife. Desertion or adultery by the wife is a highly relevant circumstance—and, it may be, a conclusive circumstance —against making an order.

National Assistance Board v. *Wilkinson* [1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255 explained.

Decision of Divisional Court [1955] 1 Q.B. 486; [1955] 1 All E.R. 700 affirmed.

Appeal from Divisional Court (Lord Goddard C.J., Ormerod and Gorman JJ.) on case stated by Flintshire justices sitting at Rhyl.

On July 3, 1954, a complaint was preferred by the National Assistance Board against the defendant, Roderick Bruce Parkes, alleging that he was the husband of Victoria Brenda Parkes, whom he was liable to maintain pursuant to section 42 of the National Assistance Act, 1948,[1] and by reference to whose requirements assistance under Part II of the Act was given on May 31,

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[1] National Assistance Act, 1948, s. 42: "(1) For the purposes of this "Act—(*a*) a man shall be liable to "maintain his wife and his children, "and (*b*) a woman shall be liable "to maintain her husband and her "children."

S. 43: "(1) Where assistance is

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1954, and other days, and was continuing to be given at the weekly rate of 39s. 6d.; and the board applied for a summons to be served upon the defendant to show cause why an order should not be made upon him under section 43 of the Act to pay such sum, weekly or otherwise, as the court might consider appropriate.

The following facts were found by the justices: The defendant husband and Victoria Brenda Parkes, the wife, were lawfully married on March 21, 1950. On August 9, 1952, the husband and the wife entered into a separation agreement whereby they agreed to live apart and the wife covenanted (i) that she would not at any future time be or claim to be entitled to any financial provision whatsoever from the husband in respect of herself and a child of the marriage or either of them, and that she would not at any future time pledge the credit of the husband and would at all future times keep the husband and his estate and effects fully and effectually indemnified against all debts and liabilities thereafter contracted or incurred by her and against all actions, proceedings, claims, demands, costs, damages, losses and expenses in respect and on account thereof; and (ii) that neither she nor any person on her behalf would at any future time directly or indirectly molest, annoy, disturb, or interfere with the husband nor at any time require or by any means either by taking judicial proceedings or otherwise endeavour to compel the resumption of cohabitation between them or to enforce any restitution of conjugal rights or to compel the husband thereafter to make to her any financial provision for herself and for the child or either of them.

The wife was in need of assistance and had received it to the extent and in the manner alleged in the complaint. On July 1, 1954, the husband was summoned to appear before the justices to answer a complaint by the wife made on the advice of officers of the board under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949, that he had wilfully neglected to maintain her, but the complaint was withdrawn on the husband consenting to an order being made under the Guardianship of Infants Acts, 1886 and 1925, for payment of 30s. per week for the maintenance of the child of the marriage until the child should

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"given or applied for by reference to "the requirements of any person . . . "the Board . . . may make a complaint to the court against any other "person who for the purposes of this "Act is liable to maintain the person "assisted. (2) On a complaint under "this section the court shall have "regard to all the circumstances and "in particular to the resources of the "defendant, and may order the defendant to pay such sum, weekly or "otherwise, as the court may consider "appropriate."

attain the age of 16 years, and also agreeing to pay voluntarily an additional 10s. per week for such maintenance. The wife was not willing to resume cohabitation with the husband. The husband was in receipt of a gross wage of £900 a year comprised of £500 basic salary and £400 East African and local cost of living allowance.

It was contended on behalf of the board that for the purposes of the National Assistance Act, 1948, a husband was liable to maintain his wife unless she had committed a matrimonial offence and that the wife had committed no matrimonial offence; that even though the wife had failed to obtain an order for maintenance the board were entitled to an order against the defendant under section 43 of the Act; and that the existence of the separation agreement containing the covenants by the wife was no bar to the board obtaining an order under section 43.

It was contended on behalf of the defendant that the liability under section 43 was subject to the common law defences open to a husband and that the existence of the separation agreement in which the wife agreed not to claim or to be entitled to any financial provision from him was a bar to the obtaining by the board of an order under section 43.

The justices were of the opinion that the husband's liability to maintain his wife ceased on the making of the separation agreement; that the agreement was a bar to the wife obtaining an order in proceedings at her suit, and that the board were necessarily under a similar disability upon the basis that their rights under section 43 were subject to defeasance by any defences available to the husband in proceedings for maintenance by the wife, and that, accordingly, the husband could not be liable to the board under the National Assistance Act, 1948, for any sum in respect of the maintenance of the wife. They therefore dismissed the complaint.

The board appealed to the Divisional Court, which, on March 2, 1955 (*National Assistance Board* v. *Parkes*[2]), allowed the appeal, holding that the board were entitled under section 43 of the National Assistance Act, 1948, to recover from the husband contributions in respect of any reasonable payments made to the wife.

The husband appealed.

R. I. Threlfall for the husband. It is submitted that the decision of the Divisional Court[2] that the board can recover from a husband whose marriage is still subsisting, whether or not there was an agreement, express or implied, between the parties when they separated that he should continue to maintain her, is wrong, on the following grounds:—

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[2] [1955] 1 Q.B. 486; [1955] 1 All E.R. 700.

(1) The general words in the Act of 1948 are not to be construed as having made a change in the then existing policy of the law, which was that a husband was not liable to maintain his wife under the poor law in any case in which he would not have been liable at common law to a tradesman who supplied necessaries to his wife. The obligations under section 42 (1) of the National Assistance Act, 1948, are not absolute, but are to be read subject to any defence which would have availed a husband at common law on a claim for maintenance. That is the effect of the decision in *National Assistance Board* v. *Wilkinson*,[3] which held that a husband whose wife has committed a matrimonial offence is not "liable to maintain his wife" under section 42; that the board is in no better position than such a wife would be; and that the words "for the purposes of this Act" in the section were not sufficient to overturn the existing law: see *per* Devlin J.,[4] referring to *Middlesex County Council* v. *Nathan*,[5] that the words were inserted so that the novel liability under the section, that a woman should maintain her husband and children, would not have repercussions on other Acts. If the obligation under section 42 is absolute, the husband's contention in *Wilkinson's* case[6] that his liability had ceased because his wife had committed a matrimonial offence, could only be considered under the discretionary powers of the justices in section 43 (2) to "have regard to all the "circumstances." Though *National Assistance Board* v. *Prisk*[7] was rightly decided on its facts, the principle laid down there by Lord Goddard C.J.[7] that a deed cannot be set up as an answer by a husband to a claim for maintenance, is not correct on the authorities.

(2) It is a good defence for a husband, whether in answer to a suit at common law by a tradesman who supplied necessaries to a wife living separate, or in answer to proceedings by the wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1945, or under section 23 of the Matrimonial Causes Act, 1950, or in answer to a criminal charge under section 3 of

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[3] [1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255.

[4] [1952] 2 Q.B. 648, 661.

[5] [1937] 2 K.B. 272; [1937] 3 All E.R. 283.

[6] [1952] 2 Q.B. 648.

[7] [1954] 1 W.L.R. 443, 445; [1954] 1 All E.R. 400.

the Vagrancy Act, 1824, and also under the National Assistance Act, 1948, s. 42, to show that his obligation to maintain his wife has ceased at common law. The wife's remedy at common law was to pledge his credit for necessaries, but only if she could show a continuing authority to do so: see *per* Pollock C.B. in *Johnston* v. *Sumner*.[8]

On the history of the husband's statutory position under the poor law, it is to be noted that before 1927 no statute in terms enacted that a husband was liable to maintain his wife. The Poor Relief Act, 1601, s. 6. did not include him among the persons liable to maintain a poor person, though the Poor Relief (Deserted Wives and Children) Act, 1718, gave the overseers a right to distrain on a deserting husband's property, and the Vagrancy Act, 1824, by section 3, made it a criminal offence for a husband wilfully to neglect to maintain his wife and children; but in *Rex* v. *Flintan*[9] Bayley J. held that a husband should not be convicted under that Act for failing to maintain an adulterous wife. In *Culley* v. *Charman*[10]—a case decided under the Poor Law Amendment Act, 1868, which first enabled guardians to recover the cost of maintaining a wife from a husband by order of the court, and required the court by section 33 to consider "all the circumstances "of the case" (words similar to those in section 43 of the Act of 1948)—it was held as a matter of law and not in exercise of the court's discretion that a husband was not liable to maintain an adulterous wife; while in *Reg.* v. *Fordham*[11] the court indicated that a husband would also not be liable to the guardians for the cost of maintaining a deserting wife. [*Jones* v. *Guardians of Newtown and Llanidloes*,[12] *Llewellyn* v. *Turner*,[13] *Oxford Union* v. *Barton*,[14] *Aldritt* v. *Aldritt*[15]; the Poor Law Act, 1927, and the Poor Law Act, 1930 (consolidating Act), were also referred to.]

(3) A husband's liability to maintain his wife ceases (a) if she commits adultery and as a result he ceases to live with her; (b) where she is in desertion; and (c) while she is living apart from him, though with his consent, and he can show that by virtue of a consensual agreement he is no longer under a continuing duty to maintain her. That last category, (c), covers the present case, where there is an express agreement to that effect which negatives any implied continuing duty. The authorities relied on

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[8] (1858) 3 H. & N. 261, 270.

[9] (1830) 1 B. & Ad. 227, 230.

[10] (1881) 7 Q.B.D. 89.

[11] (1888) 5 T.L.R. 27, 28.

[12] [1920] 3 K.B. 381; 36 T.L.R. 758.

[13] (1922) 126 L.T. 532.

[14] (1875) 33 L.T.(N.S.) 375.

[15] Unreported. June 12, 1951.

are Lord Merriman P. in *Baker* v. *Baker*,[16] who said that unless a wife claiming maintenance could show, where there was a consensual agreement on separation, that the husband had accepted such a continuing liability, she had no case at all. That applied the principle of *Johnston* v. *Sumner*,[17] and was accepted in *Stringer* v. *Stringer*.[18]

[Denning L.J. In *Tulip* v. *Tulip* [19] this court tore up an agreement for £3 a week and made the husband pay more. Why, then, should a deed providing for no maintenance prevent a wife from going to the court for maintenance when she is in need or circumstances change?]

Because she cannot show that the husband accepted a continuing duty to maintain. In *Tulip's* case [19] the husband accepted the liability but attempted to cut down the quantum. Asquith L.J.'s observations in *Chapman* v. *Chapman* [20] (as quoted in *Stringer* v. *Stringer* [21]) and Harman J.'s dissenting judgment in *Tulip* v. *Tulip* [22] support the present contention.

[Birkett L.J. In *Hyman* v. *Hyman* [23] Lord Atkin said that the wife's right to future maintenance was a matter of public concern which she could not barter away. Would not the same consideration of public policy apply here, where the State has had to assist a wife in need?]

Separation deeds are not contrary to public policy. In any event it is sufficient for this husband to rely, not on the deed, but on the common law principle established in the cases cited.

[Romer L.J. Do you say that a wife can barter away her right to future maintenance wholly but not partially?]

She cannot get maintenance if there is a deed that she shall have none, even if her husband is well-to-do. The dictum of Denning L.J. in *Price* v. *Price*,[24] that a husband's duty is to pay his wife an adequate allowance when they are living apart so long as she has not been guilty of such grave fault as to disentitle her to be maintained by him, is not consistent with the Divorce Division decisions cited above, or with *Johnston* v. *Sumner*.[25] The husband here is by virtue of the agreement no longer under a continuing duty to maintain his wife, and that defence is available to him *in law* in answer to the board's claim to recover from him under section 43 (2) of the Act of 1948.

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[16] (1949) 66 T.L.R. (Pt. 1) 81, 82.

[17] 3 H. & N. 261.

[18] [1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373.

[19] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.

[20] Unreported. April 4, 1951.

[21] [1952] P. 171, 179.

[22] [1951] P. 378.

[23] [1929] A.C. 601, 629; 45 T.L.R. 444.

[24] [1951] P. 413, 419; [1951] 2 All E.R. 580n.

[25] H. & N. 261.

Rodger Winn for the board. The husband here is liable on the plain terms of the Act of 1948, which by its preamble swept away the whole of the existing poor law, and altered the common law of England if only by making a woman liable to maintain her husband and children (section 42 (1) (*b*)). The language of that section, that "For the purposes of this Act, . . . a man "shall be liable to maintain his wife . . ." cannot have read into it the words "if also liable at common law," because of the manifest absurdity of adding those words to subsection (1) (*b*), for at common law a woman had no such liability. It is conceded that the decision of the Divisional Court in *National Assistance Board* v. *Wilkinson*,[26] though convenient for the board in that it avoids the expense of taking proceedings against a husband in cases on similar facts, is not logically consistent with the plain words of section 42; and it may be that so long as that decision stands, it has by judicial interpretation put a gloss on the Act of 1948 by exempting from section 42 a husband whose wife has committed a matrimonial offence. *Wilkinson's* case[26] requires the justices, *as a matter of law* and not as a matter of discretion to treat a case of an adulterous wife as resulting in a nil order against her husband on a claim by the board.

[ROMER L.J. I should have thought that under the clear words of section 42 the husband must maintain her, but when the matter comes before the magistrates the wife's conduct is a circumstance for their consideration.]

That may be so if this court takes that view of *Wilkinson's* case.[26] But there is no decided case binding on this court which has held that a deed on a consensual parting would free a husband from liability to repay poor law guardians or the board, when assistance has been given to his wife. *Baker* v. *Baker*,[27] *Chapman* v. *Chapman*[28] and *Stringer* v. *Stringer*[29] were decisions in the Divorce Division on whether a husband had been guilty under the Summary Jurisdiction Acts and the Law Reform (Miscellaneous Provisions) Act, 1949, of "wilful neglect to maintain." It is possible that if a husband taken before the magistrates under those Acts could show a separation deed in the present form he would escape conviction; but those decisions have little to do with the position at common law, under which a wife had no

[26] [1952] 2 Q.B. 648.

[27] 66 T.L.R. (Pt. 1) 81.

[28] Unreported. April 4, 1951.

[29] [1952] P. 171.

enforceable right to maintenance; and they have nothing at all to do with the position of the guardians under the poor law, or of the board under the Act of 1948. A man cannot contract out of liability under that Act, because the public policy enunciated in it is that certain persons, and not the taxpayers as a whole, shall, if they can be found, repay the board. A man may have a defence in law when he is brought before the justices; but a parting by consent, or a fortiori with a contractual exclusion of the wife's right to have recourse to her husband for maintenance, is so contrary to the policy of the Act that it cannot be a valid defence. The justices may have a discretion to consider what effect they will give to a consensual agreement when they "have regard to "all the circumstances" under section 43 (2); but that is not a defence in law. Nothing in the authorities cited requires this court to decide that where there is a nil provision in a separation agreement the wife cannot obtain maintenance when circumstances change and she is in such need that she requires assistance. The husband is liable on the plain words of the statute. [*Dowell* v. *Dowell*,[30] following *Tulip* v. *Tulip*,[31] was also referred to.]

Threlfall replied.

DENNING L.J. On March 21, 1950, Mr. and Mrs. Parkes were married. On August 9, 1952, while they were living in Kenya, they entered into a separation agreement in which they agreed to live separate and apart. The wife covenanted that she would not claim any maintenance or any financial provision from her husband in respect of herself or her child and would not petition any court at any time. She came back to England but later she fell on bad times, so much so that she had to ask for national assistance. The husband is paying £2 a week for the child's maintenance, but nothing for the wife. The National Assistance Board have paid 39s. 6d. a week to the wife and now bring a summons against the husband asking that he should contribute towards the amount which they are paying to her. They point out that the husband is in receipt of a gross wage of £900 a year, £500 salary and £400 local allowance. The husband makes answer and says that by reason of the deed he is under no obligation to maintain his wife at all, and, therefore, he says, the National Assistance Board have no right against him either.

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[30] [1952] W.N. 296; [1952] 2 All E.R. 141.

[31] [1951] P. 378.

The claim of the board depends on the National Assistance Act, 1948, which abolished the old Poor Law Acts and put in their place provisions whereby people in need could receive national assistance. It is specifically enacted in section 42: " (1) For the "purposes of this Act—(*a*) a man shall be liable to maintain "his wife and his children, and (*b*) a woman shall be liable to "maintain her husband and her children." Then, by section 43 (1), when assistance is given, the board " may make a complaint to "the court against any other person who for the purposes of this "Act is liable to maintain the person assisted." Subsection (2) provides: " On a complaint under this section the court shall "have regard to all the circumstances and in particular to the "resources of the defendant, and may order the defendant to "pay such sum, weekly or otherwise, as the court may consider "appropriate." By that section it is laid down that a man is liable to maintain his wife and his children for the purposes of the Act, and a woman is liable to maintain her husband and her children. That is a change in the law which must be given proper effect; but the important provision for present purposes is that the court is to " have regard to all the circumstances." I think that under that provision the court must have regard, among other things, to any circumstances recognized by the law as sufficient to relieve a husband of his obligation to maintain his wife. From the very earliest times, both in the ecclesiastical courts and in the common law courts, a husband has been under no liability to maintain his wife if she has been guilty of adultery or desertion; and when various statutes have been passed, putting an obligation on the husband, the courts have held that his statutory duty is subject to the same exception. In *Culley* v. *Charman* [1] it was so held on a statute which enabled the court to consider all the circumstances of the case. Likewise it has been held by the Divisional Court in *National Assistance Board* v. *Wilkinson* [2] that a husband has an answer in law to any summons by the National Assistance Board if his wife has been guilty of adultery or desertion. That decision, I think, was perfectly right, on this ground, that her guilt is one of the circumstances of the case to which the magistrates must have regard. It is so strong a circumstance that it affords an answer in law to the claim.

In the present case Mr. Threlfall says that there is an additional circumstance which gives the husband an answer to the wife's claim, and, therefore, should give an answer to the claim by the board. That circumstance, he says, is the presence of a separation agreement by which the wife has said she will ask for no maintenance. In my judgment the presence of such a separation deed does not ipso facto destroy the husband's obligation to maintain his wife. It did not do so at common law, and does not do it now. So the whole foundation of Mr. Threlfall's argument, in my judgment, fails.

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[1] (1881) 7 Q.B.D. 89.

[2] [1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255.

Separation by consent is not itself a bar to maintenance. ✓ The husband's duty to maintain his wife continues (see *Price* v. *Price* [3]), but the extent of the duty depends on the circumstances. ✓ Sometimes it happens that, when the parties separate, the husband agrees to pay the wife a fixed sum, which is sufficient for her maintenance in her then situation, having regard to her own earning capacity. In such a case the husband fulfils his duty by paying that sum so long as that situation continues. He is not under any obligation to pay more unless new circumstances arise in which she needs more, as, for instance, if she is stricken with illness, or if money changes in value, so that the named sum is inadequate. If she brings these new circumstances to his notice and he has the means to pay more, then he is under a duty to increase the sum, notwithstanding the prior agreement. If he does not pay her more according to her needs in the new situation, he is guilty of wilful neglect to maintain her: see *Tulip* v. *Tulip* [4]; *Dowell* v. *Dowell* [5]; *National Assistance Board* v. *Prisk*.[6]

Sometimes, however, it happens that when the parties separate they make no agreement for maintenance, for the simple reason that the wife does not ask for maintenance. She may have means of her own, or may be able to earn, or can live with her parents. She may even agree, as here, that she will never claim maintenance from him. In such a case, so long as things remain the same, the husband is not under any obligation to pay any maintenance to her. But new circumstances may arise to alter the ~~situation~~. The wife may fall on evil days when she is unable to earn. She may lose her parents and be unable to look to them for support. She may even, as here, have to fall back on public assistance. If these facts are brought to the husband's notice and he has the means to pay, then he is under a duty to maintain her, notwithstanding the prior agreement that he should pay nothing. The principle of *Tulip* v. *Tulip*[7] applies, I think, just as much when there is an agreement to pay nothing as when a fixed sum is to be paid; and it overrides anything said previously in *Baker* v. *Baker*[8] and *Chapman* v. *Chapman*.[9] But so long as the husband is ignorant of the new situation he is under no such duty, and is not guilty of wilful neglect to maintain her. That is, I think, the effect of the decision in *Stringer* v. *Stringer*.[10]

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[3] [1951] P. 413, 419; [1951] 2 All E.R. 580n.

[4] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.

[5] [1952] 2 All E.R. 141; [1952] W.N. 296.

[6] [1954] 1 W.L.R. 443; [1954] 1 All E.R. 400.

There is one more remaining case to consider. It may sometimes happen that, when the parties separate, the husband refuses to pay enough to his wife, but only agrees to pay her a small sum, little or nothing, though he could well pay more; and she, for the sake of peace, agrees to it. It may even be his intention that she should resort to public assistance so as to relieve his pocket. I do not think that he could thereby escape from his duty to maintain her. Even though there may be no new circumstances, nevertheless a husband cannot shift his responsibility on to the rest of the community in that way. His duty to maintain her remains, despite the agreement.

N.B.

The truth is that, on a separation by consent, the existence of an agreement for fixed maintenance, or for no maintenance, does not oust the duty of the husband to maintain his wife. As Lord Atkin said in *Hyman* v. *Hyman*[11]—in another connexion, but I think his words are apposite here also—"The wife's right "to future maintenance is a matter of public concern, which she "cannot barter away." In the great majority of cases, the husband, by fulfilling his agreement, fulfils his duty; but circumstances may arise when the wife is in need and the husband knows of it and can and ought to pay for her. The private agreement of the parties must then give place to the overriding duty of a man to maintain his wife. His duty only ceases when she has been guilty of a grave fault, such as adultery or desertion, by which she forfeits her right to maintenance.

I ought perhaps to say that, when a separation deed is overridden in this way, it does, I suppose, cease thenceforward to bind the parties to separate. The way is open to reconciliation. Either side can make a genuine offer to return and make a home again; and the one who refuses must take the consequences.

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[7] [1951] P. 378.

[8] (1949) 66 T.L.R. (Pt. 1) 81.

[9] Unreported. April 4, 1951.

[10] [1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373.

[11] [1929] A.C. 601, 629; 45 T.L.R. 444.

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National Assistance Board v. Parkes.

Denning L.J.

In the present case the wife became in such need that she had to resort to public assistance. When the husband knew of it, it became his duty to maintain her, despite the deed. She could, I think, have applied to the court on the ground of his wilful neglect to maintain her, and have obtained an order against him. The National Assistance Board can in these circumstances claim a contribution from him towards the amount they have paid. It will, of course, be open to the magistrates to consider all the circumstances before they decide what amount, if any, the husband should contribute. All that we decide today is that the deed of separation is not itself a bar to the claim.

I think that the decision of the Divisional Court was right, and that the appeal should be dismissed.

Birkett L.J. I am of the same opinion. The court is indebted to Mr. Threlfall for his argument detailing the history of the legislation with which we are concerned. It is true that Mr. Rodger Winn said that he was not concerned with the history of that matter at all, for the Act of 1948, he submitted, created quite a new situation. But it was of the greatest assistance to have the background of the history of the legislation of which the Act of 1948 forms a culminating point. It is rather curious to observe why, according to that history, there was until 1927 no statute in this country which made the husband liable to maintain his wife. The history began by the Poor Relief Act, 1601, section 6 of which indicated that a father, a grandfather, a mother, a grandmother and children should maintain a poor person; but no mention was made of a husband. Of course, at common law a husband was liable to maintain his wife, although that liability might be displaced by her adultery, or suspended by her desertion.

We were taken through several Acts of the 19th century where steps were taken by statute to recover from the husband sums of public money which had been paid by the guardians in respect of poor persons. The Poor Law Amendment Act, 1868, in particular was cited, some of the language of which is incorporated in one of the sections of the Act of 1948, and particularly the phrase "all the circumstances of the case," which appears in section 33 of the Act of 1868. The husband might also be made criminally liable under the Vagrancy Act, 1824, but the authorities had in those statutes a statutory right to recover public moneys which had been paid out for the relief of poor persons. By the Poor Law Act, 1927, the husband was added to that category of father, grandfather, mother, grandmother, and so on, for the first time, provided that he had sufficient means —a very important qualification. There were various other statutes in which the guardians were substituted for the Local Assistance Board, and so on.

The change which was made by the National Assistance Act, 1948, was really quite revolutionary. The statute itself was passed at a time when social legislation was very much to the fore and social changes of very great moment were being brought about. The preamble to the Act is highly significant on the construction of the sections with which we have to deal: "An Act "to terminate the existing poor law and to provide in lieu thereof "for the assistance of persons in need by the National Assistance "Board and by local authorities; to make further provision for "the welfare of disabled, sick, aged and other persons and for "regulating homes for disabled and aged persons and charities "for disabled persons; to amend the law relating to non-"contributory old age pensions; to make provision as to the burial "or cremation of deceased persons; and for purposes connected "with the matters aforesaid"—a preamble covering, as the statute does, an exceedingly wide field. Part I, section 1, provides: "The existing poor law shall cease to have effect, and "shall be replaced by the provisions of Part II of this Act as to "the rendering, out of moneys provided by Parliament, of "assistance to persons in need, the provisions of Part III of this "Act as to accommodation and other services to be provided by "local authorities, and the related provisions of Part IV of this "Act."

All that we are concerned with here today is Part II and Part IV of the Act, though one must not be blind to the fact that the other sections of the Act make far-reaching changes in the existing state of affairs dealing with the poor. Section 4 in Part II of the Act says: "It shall be the duty of the Board in "accordance with the following provisions of this Part of this "Act to assist persons in Great Britain who are without resources "to meet their requirements, or whose resources (including "benefits receivable under the National Insurance Acts, 1946) "must be supplemented in order to meet their requirements." That is the first great provision of the Act, the duty of the board to assist persons in Great Britain who are without resources. Then section 5: "(1) The question whether a person is in need "of assistance, and the nature and extent of any assistance to be "given to him, shall, subject to the provisions of this Act as to "appeals, be decided by the board." What the Act plainly purports to do is to sweep away all the provisions which are set out in very long schedules at the end of the Act, some sections of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949, and many sections of the Poor Law Acts, sweeping away, in fact, the poor law body as it existed at that time and substituting for it something which, on the face of it, is much simpler, though Mr. Threlfall admitted that it was a little complicated.

In those circumstances we have to consider section 42, which is headed "Recovery of Expenses": "(1) For the purposes of "this Act—(*a*) a man shall be liable to maintain his wife and "his children, and (*b*) a woman shall be liable to maintain her "husband and her children." There are various references to putative fathers, and so on, but that is the main provision. The father, mother, grandfather, and grandmother have all gone. It is on the construction of that section that all the argument has turned. Mr. Threlfall has said that one must read that section not simply "for the purposes of this Act," but with the very important qualification "subject to the legal decisions "which have placed the husband in certain respects in a 'particular position."

There follows section 43 (1). [His Lordship read the section, and continued:] A man shall be liable to maintain his wife. The board may make a complaint to the court against a man who is liable to maintain his wife, liable to maintain the person who has been assisted by the National Assistance Board. Subsection (2) provides: "On a complaint under this section the "court shall have regard to all the circumstances and in "particular to the resources of the defendant, and may order the "defendant to pay such sum, weekly or otherwise, as the court "may consider appropriate."

In the case before us we are not very fully informed about the history. From the case stated it is clear that the marriage took place on March 21, 1950. On August 9, 1952, slightly over two years later, the husband and the wife entered into the separation agreement, and they agreed to live separate and apart. The wife covenanted in that agreement as follows: "The wife will "not at any future time be or claim to be entitled to any "financial provision whatsoever from the husband in respect of "herself and the said child or either of them and that she will "not at any future time pledge the credit of the husband and "will at all future times keep the husband and his estate and "effects fully and effectually indemnified against all debts and "liabilities hereafter contracted or incurred by the wife and "against all actions proceedings claims demands costs damages "losses and expenses in respect and on account thereof." Then there is the usual non-molestation clause. That agreement was made within two years of the marriage. Why that situation arose we do not know, and I do not suppose that it is really material to the decision we have to make. Whether the wife at the time she entered into that covenant was able to earn and said, as a great many wives do: "I will not be dependent on you at all; I am "capable of looking after myself," we do not know. In 1952 it is clear that that situation, if it ever existed, did not exist any longer. The wife was in need within the meaning of section 4 of the National Assistance Act. [His Lordship read further facts and contentions from the case stated, and continued:] It was said for the husband that section 43, under which the board moved, was subject to the common law defences which were open to the husband. It was not simple and straightforward, but was hedged about by the position of the husband, and the law and the decided cases which had dealt with the position of a husband. For example, it was said that if the wife had committed adultery there was no liability at all; if the wife was in desertion there was no liability at all for the time being at least, or that it would be suspended, and so on. It was said, too, that the existence of the separation agreement into which the wife had admittedly entered was a bar to the National Assistance Board coming to the court under the provisions of this section. The magistrates stated their view for the opinion of the High Court. [His Lordship read the opinion from the case stated and continued:] That matter went to the Divisional Court, and Lord Goddard C.J. delivered the judgment of the court.[12] There were two cases which were in fact tried together. In principle they really amounted to the same thing, though they were looked at from rather different points of view. Lord Goddard C.J. said with regard to this particular case[13]: "The wife became desti-"tute and had to go to the National Assistance Board, and "the justices held that the deed was a bar to their making any "order on the husband. In my opinion, that decision cannot "be supported, and it is entirely contrary to the true ground "upon which *National Assistance Board* v. *Prisk*[14] was decided.

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[12] [1955] 1 Q.B. 486; [1955] 1 All E.R. 700.

[13] [1955] 1 Q.B. 486, 497, 498.

[14] [1954] 1 W.L.R. 443.

"In *Prisk's* case,[14] the husband had agreed to pay one pound "a week to his wife and that was all, but because of the fall "in the value of money the one pound a week was not enough; "this court decided that when the National Assistance Board "had increased her income by giving her assistance the husband "was bound to repay. What difference can it make that in one case "he agreed to give her one pound a week and in the other an "agreement was made under which he was to undertake no "liability?"—that is *Prisk's* case.[14] He went on[15]: "The "answer is that the court is not bound by the agreement between "the parties. It must ascertain what is reasonable maintenance "for the wife, and if she has not committed any matrimonial "offence, any reasonable allowance which the National Assistance "Board give her can be recovered from the husband."

I will not consider all the cases which Mr. Threlfall put to us, though I have them well in mind. I think I ought to say that the passage from the judgment of Asquith L.J. in *Chapman* v. *Chapman*,[16] which was so strenuously relied on, was a passage in which I am fully satisfied he was not contemplating for one moment the kind of situation which has arisen in the present case. I say that for this reason: *Chapman* v. *Chapman*[16] was heard on April 4, 1951. But another case, *Tulip* v. *Tulip*[17] was heard the next day and the following day. The court reserved judgment and delivered it on May 10. Asquith L.J. had then become Lord Asquith, but he was a member of the court which decided *Tulip* v. *Tulip*,[17] and, although he did not deliver a judgment of his own, he expressly empowered me, in delivering the judgment of the court, to say that he had read it and agreed with it. The other member of the court, Harman J., dissented. The case was one in which Barnard J. had decided that where there was a separation agreement in existence, as there was, and the wife admittedly had agreed to accept a certain sum as maintenance, she could not come to the court under the Law Reform (Miscellaneous Provisions) Act, 1949, or at all, and say: "It is inadequate, or insufficient; I want more." That view was taken by Harman J. in his dissenting judgment. The husband in that case had been written to and had been told: "The agreement we entered into was very long ago when money "values were so very different, and it is no longer applicable "today." There was evidence that the husband's means had very much increased and the wife's had very much decreased, but he was not willing to do anything but rely on the agreement. This court said: " She is perfectly entitled to come and ask, and " that is the right which she has been denied hitherto. It may " very well be that on the facts the court might make no altera- " tion, but that is another matter. That she has a right to come " and put her case is not denied." Lord Asquith agreed in that judgment.

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[14] [1954] 1 W.L.R. 443.

[15] [1955] 1 Q.B. 486, 498.

[16] Unreported. April 4, 1951.

[17] [1951] P. 378.

Therefore the situation is this: in the present case there is a separation agreement, and admittedly a covenant with no maintenance and a covenant not to apply for maintenance. Some time later the wife is in need and the National Assistance Board under the Act grant her assistance. They then, under the machinery of the Act, come to the court and ask the husband to pay. The answer is: " No, I stand upon the covenant." I am utterly unable to understand what is the difference in principle between an agreement to separate in which the maintenance is said to be £1, but conditions alter and the wife says it ought to be £2 or £3, and the case where there is a separation agreement, with an agreement to pay nothing, but later conditions alter and the wife is in need. In the first case, if the argument is valid, a man ought to be allowed to say: " I bargained that you should " have £1 a week and never at any time any more." The courts have already said that that will not do [*Tulip* v. *Tulip* [17]]. In this case the husband says: " I bargained that you should " have nothing and you will never have any more." I cannot see why that distinction should be drawn, and I decline to draw it. It would be most unjust, where the facts were that the wife was in need and somebody must maintain her and the National Assistance Board had stepped in because she was in need, if a husband could say: " You cannot touch me because I had a " private bargain that I should never be touched." Where public money is expended in that way it would be quite wrong to say that a private bargain should overrule the right and power contained in the statute which provides that public money in appropriate circumstances should be recovered. For these reasons, I am of opinion that the Divisional Court came to a right conclusion.

ROMER L.J. I agree. I only want to add a word or two because there may be some little misapprehension as to the true construction of sections 42 and 43 arising from the decision of the Divisional Court in *National Assistance Board* v. *Wilkinson.*[18] Although I respectfully and entirely agree with the result of that decision, I cannot myself accept what I believe to be the ground on which the decision was founded. The result of the decision was to exempt from the class of persons mentioned in section 42 (1) of the Act a husband whose wife had committed a matrimonial offence. That result was, in my opinion, quite right; but it seems to me that the conclusion of the court (as especially appears from the judgment of Devlin J.[19]) was reached by excluding from the category of persons referred to in section 42 (1) of the Act such a husband as I have mentioned. It appears to me that the language of section 42 (1) is too clear to allow of any such exclusion. It says: "For the purposes of this Act a man shall "be liable to maintain his wife," and then in subsection (1) of section 43 it is provided: "Where assistance is given or applied "for by reference to the requirements of any person (in this "section referred to as a person assisted), the Board or the "local authority concerned may make a complaint to the court "against any other person who for the purposes of this Act is "liable to maintain the person assisted." It appears to me to be perfectly plain that among the "purposes of the Act" referred to in section 42 are those comprised in section 43, from which I think it is clear that the definitions in section 42 apply, and the board can make a complaint against any married man that he should recoup the assistance which the board has given to his wife. If the construction which the Divisional Court put on section 42 is right, the board would have to find out (and it would have no certain means of ascertaining) whether the separation was due to the wife having left the husband for some reasonable cause and the circumstances generally of a separation, before they could serve a complaint on the husband. The clear effect of sections 42 and 43 is that the guardians can bring before the justices a married man whose marriage is still subsisting, but when he comes before the court, the circumstances which are referred to in subsection (2) of section 43 are brought into play, and, as Denning L.J. has pointed out, a highly relevant circumstance—and, it may be, a conclusive circumstance—which would prevent the magistrates from making an order under section 43, would be the fact established by the husband—if it was established—that his wife had committed a matrimonial offence. I think that one arrives at the conclusion at which the Divisional Court arrived in *Wilkinson's* case [20] by bringing a husband whose wife had committed a matrimonial offence within the category of section 43 and then exempting him if such offence be established. If that be the true position, as I conceive it to be, then the husband here has sought to bring this case within it by saying that just as the fact that a husband's wife has committed a matrimonial offence is a relevant circumstance which releases him from liability to maintain her, so also it would be a relevant circumstance that the husband has acquired contractual freedom from liability to maintain his wife. On that aspect of the case I so entirely agree with what my brethren have said that it is superfluous to add anything to the judgments which have been delivered. It does not appear to me that there is any foundation for that argument, because a husband cannot in law wholly contract out of his liability to maintain his wife. I accordingly agree that the appeal should be dismissed.

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[17] [1951] P. 378.

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[18] [1952] 2 Q.B. 648.

[19] Ibid. 661.

Appeal dismissed.
Order of Divisional Court confirmed.

Solicitors: *Gibson & Weldon for Archer & Wilcock, Nairobi; Solicitor, National Assistance Board.*

M. M. H.

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[20] [1952] 2 Q.B. 648.

STRONGMAN (1945) LD. *v.* SINCOCK.

[1950 S. No. 892.]

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July 8, 11, 12.

Denning, Birkett and Romer L.JJ.

Building — Contract — Licence — Warranty to obtain — Promise by architect to obtain licences required by regulations—Architect also owner of building—Work carried out by builders in excess of licences obtained — Contract illegal — Builders not negligent — Builders entitled to recover damages for breach of warranty against architect—Defence (General) Regulations, 1939 (*S.R. & O.,* 1939 (*No.* 927), *as amended* (*S.R. & O.,* 1945, *No.* 502)), *reg.* 56A.

Contract—Illegality — Warranty of legality. Contract — Collateral warranty.

An architect owner contracted with builders to supply materials and carry out work at his premises, and promised orally that he would obtain all the licences necessary at that date under regulation 56A of the Defence (General) Regulations, 1939. Work considerably in excess of the licences granted was carried out. In an action by the builders claiming the balance of the price over the licensed amount, or alternatively damages for a similar amount for breach of the warranty to obtain the licences:—

Held, (1) that the builders could not recover the price under the contract, since the contract was illegal as being absolutely prohibited by the regulations.

(2) That the assurance given by the architect amounted to a warranty or collateral contract that he would obtain the supplementary licences or stop the work if he could not obtain them.

(3) That unless the builders had themselves been morally to blame or culpably negligent they might recover damages in a civil action for breach of warranty (and similarly for fraud), since they had been led to commit the criminal offence which was absolutely prohibited by the promise or representation of the architect.

(4) That these builders had not been culpably negligent in themselves failing to obtain licences or ascertaining that they had been obtained, since, as between architect and builder, the primary obligation to obtain licences was by universal practice admitted to be on the architect, and that duty was not displaced in the present case by the fact that the architect was also the building owner. The builders were accordingly entitled to damages.

In re Mahmoud and Ispahani [1921] 2 K.B. 716; 37 T.L.R. 489; *J. Dennis & Co. Ld.* v. *Munn* [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616 and *Askey* v. *Golden Wine Co. Ld.*, 64 T.L.R. 379; [1948] 2 All E.R. 35 distinguished.

Burrows v. *Rhodes and Jameson* [1899] 1 Q.B. 816; 15 T.L.R. 286 and *Gregory* v. *Ford* [1951] 1 All E.R. 121 approved.

Per Romer L.J. A man can give a warranty even though he cannot carry it into effect, and the builders were not precluded from relying on that warranty by reason of the fact that the architect could not obtain licences as of right.

APPEAL from a decision of His Honour Sir Lionel Leach Q.C. (Official Referee).

The plaintiffs were a firm of builders who, since 1945, had carried on business in West Cornwall. The defendant was an architect by profession and the owner of the premises in the present case. In 1948 and 1949 the architect owner employed the builders to carry out certain work at two premises owned by him. At that date the Defence (General) Regulations, 1939 (as amended), were still in force, and by regulation 56A [1] licences were required to cover the greater part of the work to be done at the premises. Two licences were in fact obtained by the architect, for £1,690 and £460 respectively, making a total of £2,150 authorized costs. Total payments of £2,900 were made to the builders by the architect owner on account by October, 1949, but the total value of the work carried out was alleged by the builders to be £6,905; and in February, 1950, they instituted proceedings against the architect for the balance of £4,005 alleged to be owing. By their statement of claim they pleaded that before entering into these agreements the architect had orally warranted that he would himself obtain all the licences which might be required. They claimed the balance of the price for work done and materials supplied under the contract; alternatively, they pleaded that if they were unable to recover the balance by reason of the fact that licences had not been obtained and that the contract was therefore tainted with illegality, they were entitled to damages in a similar sum for breach of warranty. The architect by his defence and counterclaim pleaded, inter alia, that if the sums in excess of the amounts for which licences had been granted had been expended, such excesses were illegal under and by virtue of regulation 56A, since no licence had been granted.

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[1] Defence (General) Regulations, 1939, reg. 56A: "(1) Subject to the "provisions of this Regulation the "execution in the United Kingdom ". . . of any operation specified . . . "shall be unlawful except in so far "as it is authorized by the authority "specified. . . . (7) An authorization "or licence granted for the purposes "of this Regulation may be granted "subject to conditions or limitations, "and in particular may be limited so "as to authorize the execution of an "operation in part only or the carry-"ing out of some, but not all, of the "work for a licence for which appli-

In June, 1952, the parties agreed to an arbitration on the question of the value of the work done, which was also in dispute, reserving all questions of law for the official referee. The arbitrator on April 17, 1953, gave his award that, after allowing for the £2,900 already paid by the architect to the builders, £3,459 was due to the builders. The matter was then referred back to the official referee, who found that the alleged warranty by the architect that he would obtain the necessary licences was established on the evidence, and held that though the builders were precluded from recovering under the illegal contract they were entitled to the same sums by way of damages.

"cation is made. (8) If any condition attached to an authorization or "licence granted for the purposes of "this Regulation is contravened or "not complied with, then, whether "or not the authorization or licence "is revoked, the person at whose "expense the operation is executed "or the work is carried out in "respect of which the authorization or licence was granted and "(where he is not the same person) "the person undertaking the execution of the operation, or the carrying out of the work, and any architect, engineer or other person "employed in an advisory or supervisory capacity in connexion with "the execution of the operation or the "carrying out of the work shall each "be guilty of an offence against this "Regulation."

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On March 29, 1955, he accordingly gave judgment for the builders for £3,459 as damages for breach of warranty.

The architect appealed.

Dingle Foot Q.C. and *T. O. Kellock* for the architect. First, there was no evidence on which the official referee could find that there was in law a warranty. There was only a conversation in general terms as to the system to be followed in a series of transactions, in the course of which the architect said that he would get the necessary licences. The onus was on the builders to show that that statement was made in reference to, and was intended by both parties to be a term of, these particular contracts. That was the test applied by Lord Haldane L.C. and Lord Moulton to the conversation in *Heilbut, Symons & Co.* v. *Buckleton.*[2] At its highest there was an oral representation inducing the contract: *Gilchester Properties Ld.* v. *Gomm.*[3] It was not a warranty. Moreover, a man cannot give a warranty which he is unable to perform; and here only the licensing authorities had power to decide whether or not licences would be granted.

Secondly, where a class of contract is absolutely prohibited by statute, and there is no element of mens rea in the statutory offence, a plaintiff who acts in breach of that prohibition cannot recover, either under the contract or by way of damages for breach of warranty. The duty to obtain licences under regulation 56A is laid equally on builders, building owners, and architects; when they build without a licence they are in pari delicto; and there can be no redress as between wrongdoers. These builders were within the limits of that rule as stated by Best C.J. in *Adamson* v. *Jarvis,*[4] in that they "must be presumed to have "known" that they were doing an unlawful act, since no builder at the relevant date could have failed to know that unlicensed building was illegal. They cannot recover under the illegal contract: *Holman* v. *Johnson*[5]; *Howell* v. *Falmouth Boat Construction Co. Ld.*[6]; *Scott* v. *Brown, Doering, McNab & Co. Slaughter & May* v. *Brown, Doering, McNab & Co.*[7] In *Brightman & Co.* v. *Tate*[8] McCardie J., holding that a plaintiff could not recover on a contract for unlicensed building, drew a distinction between cases where the plaintiff had knowledge of the illegality and those where he had not [9]; and though that distinction was later doubted by the court in *In re Mahmoud & Ispahani*,[10] in which the defendant knew at the time of contracting that he had not got the necessary licence, Bankes and Scrutton L.JJ.[11] expressed doubts as to what the position would have been if the plaintiff had been misled by fraud on the part of the defendant; but Atkin L.J.[12] said that even if there had been fraud the plaintiff would not have been able to recover on the illegal contract. That passage is strong support for the present submission that there can be no right of recovery, either under the contract or by way of damages for breach of warranty in the present case, because this class of contract is absolutely prohibited by a statute passed in the public interest; and it would defeat the whole purpose of regulation 56A and other licensing regulations if a wrongdoer could recover damages in this way. Nor is there any distinction between a contract illegal ab initio and one which became illegal in the course of its performance: *Edell* v. *Dulieu* [13]; *B. & B. Viennese Fashions* v. *Losane*.[14]

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[2] [1913] A.C. 30, 36, 47–8.

[3] 64 T.L.R. 235; [1948] 1 All E.R. 493.

[4] (1827) 4 Bing. 66, 73.

[5] (1775) 1 Cowp. 341.

[6] [1951] A.C. 837; [1951] 2 T.L.R. 151; [1951] 2 All E.R. 278.

[7] [1892] 2 Q.B. 724; 8 T.L.R. 755.

[8] [1919] 1 K.B. 463; 35 T.L.R. 209.

Thirdly, if, contrary to the second submission above, it is ever possible for a plaintiff to recover in circumstances where a contract is absolutely prohibited by statute, then it is submitted that he cannot recover unless there is fraud; and there is no suggestion of fraud in the present case. There is a clear legal distinction between claims in fraud which are based on tort, and claims for breach of warranty which are based in contract, because the warranty is part of the tainted contract. *Harse* v. *Pearl Life Assurance Co.*[15] and *Hughes* v. *Liverpool Victoria Legal Friendly Society* [16] show that where there is anything less than fraud the parties are in pari delicto. If there is no distinction between fraud and breach of warranty, it would mean that in any case where a licence was required by statute any person who could show that the other side had assumed the burden of obtaining the licences could always recover, and the whole purpose of such regulations would be defeated, particularly if a mere expression of intention is to be interpreted as a warranty. The judgment of Kennedy J. in *Burrows* v. *Rhodes and Jameson*,[17] and particularly the dictum obiter that [18] "it is . . . also clear that an "action for indemnity grounded either on deceit or warranty "may be maintained where the party who seeks the indemnity "has incurred damage . . .", which is relied on by the present plaintiffs and was cited by the official referee, do not assist, for no question of warranty arose in *Burrows'* case.[18] The plaintiff in that case had been induced to commit an offence, under the Foreign Enlistment Act, 1870, in which mens rea was an essential element, and though the distinction between the two classes of statutory offence was not argued in *Burrows'* case,[18] the decision there proceeded on the basis that Burrows had been induced to commit the offence by the two fraudulent misrepresentations of Rhodes and Jameson. *Road Transport and General Insurance Co. Ld.* v. *Irwin and Adams*,[19] in which Roxburgh J. held that an uninsured driver of a vehicle could recover, although the legislature absolutely prohibits a person from taking a car on the road without the necessary third party insurance, is contrary to the authorities. It is necessary in each case to look at the duty imposed by the statute: and the duty under regulation 56A is a heavy one, falling equally on builders, architects and building owners. [*Cointat* v. *Myham & Son*,[20] approved in *Marles* v. *Philip Trant & Sons Ld.*,[21] were also referred to.]

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[9] [1919] 1 K.B. 463, 472, 473.

[10] [1921] 2 K.B. 716; 37 T.L.R. 489.

[11] [1921] 2 K.B. 716, 726, 730.

[12] Ibid. 731–2.

[13] [1924] A.C. 38; 40 T.L.R. 84.

[14] [1952] 1 T.L.R. 750; [1952] 1 All E.R. 909.

[15] [1904] 1 K.B. 558; 20 T.L.R. 264.

[16] [1916] 2 K.B. 482; 32 T.L.R. 525.

Fourthly, the official referee was not entitled in law to find that the builders had not been negligent in failing to insist on the production of supplementary licences before doing further work, for in *J. Dennis & Co. Ld.* v. *Munn*,[22] *Woolfe* v. *Wexler* [23] and *A. Smith & Son (Bognor Regis) Ld.* v. *Walker*,[24] the court laid down in the clearest possible terms the duty of builders, in relation to licences, namely, that they are not entitled to rely on the owner's assurance that he has the licence but must see it for themselves before they carry on the work. The builders here fell far short of that duty.

[DENNING L.J. But the architect here admitted that the universal practice as between builder and architect is that the architect shall get the licences.]

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[17] [1899] 1 Q.B. 816; 15 T.L.R. 286.

[18] [1899] 1 Q.B. 816, 828.

[19] Unreported. March 9, 1955.

[20] [1913] 2 K.B. 220; 29 T.L.R. 387.

[21] [1954] 1 Q.B. 29; [1953] 1 All E.R. 651.

[22] [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616.

[23] [1951] 2 K.B. 154; [1951] 1 T.L.R. 794; [1951] 1 All E.R. 635.

[24] [1952] 2 Q.B. 319; [1952] 1 T.L.R. 1089; [1952] 1 All E.R. 1008.

It can make no difference in principle that in the present case the building owner was also an architect by profession. The duty remains that stated in the building case authorities.

Bazil Wingate-Saul for the builders. First, it is not necessary for the builders to establish that the warranty alleged related to these particular contracts, provided that both parties intended it to be a part of the contractual relationship; and in any event the finding of the official referee that there was such a warranty cannot be disturbed. Further, if a man is foolish enough to give a warranty which he cannot perform, that does not destroy his obligation. But the form of warranty found by the official referee in the present case was that the architect warranted that he would either obtain the licences or stop the work; and in that form it is quite unexceptionable.

Secondly, there is no authority binding on this court that in the class of statutory offence in which mens rea is not a necessary element a plaintiff cannot rely on a warranty if he is implicated in a contract rendered illegal by statutory prohibition. The authorities cited on this submission were concerned with the contract itself and the dicta relied on were obiter. *In re Mahmoud & Ispahani* [25] is also distinguishable, for the decision of the court was on an illegal contract and not on a warranty; and the dicta of two of the Lords Justices that if the action had been founded in fraud the action might have been successful, as also that of Atkin L.J., were obiter. The three building cases cited are distinguishable, for in each of them a builder was dealing with a lay-owner and there was no architect. Here the architect admitted the practice that as between builder and architect the architect obtained the licence.

[DENNING L.J. In *Gregory* v. *Ford* [26] it was held that a servant could recover an indemnity or damages from a master who allowed him to drive an uninsured vehicle, because it was said that there was an implied promise by the master that he would not ask his servant to do anything unlawful.]

Yes; and there have been other decisions under the Road Traffic Act, 1930, where an insured driver has been involved in an accident involving the commission of a crime, and yet has been held entitled to recover under his insurance policy. If the submissions for the present defendant are correct such recovery would be impossible, since there is an absolute prohibition under the statute. Kennedy J., in *Burrows* v. *Rhodes and Jameson*,[27] did not draw any distinction between a case involving mens rea and one of absolute liability; and he specifically bracketed "deceit" and "warranty" together.[28] His judgment has received approval in the Court of Appeal: *Weld-Blundell* v. *Stephens*, *per* Scrutton L.J.[29] [*Haseldine* v. *Hosken*[30]; Denning L.J. in *Marles* v. *Philip Trant & Sons Ld.*[31] that a man could be guilty of a crime without any moral culpability; and *Cointat* v. *Myham & Son*[32] were also referred to.] It cannot be just or right that there should be a distinction between the two forms of statutory offence such that in the result, for example, a man who is deceived into taking part in a crime like the Jameson raid, involving bloodshed and violence, may recover against the man who deceived him, while an unfortunate publican whose malicious customer alters the hands of his clock cannot recover, because the offence of remaining open after statutory closing time is one of absolute liability.

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[25] [1921] 2 K.B. 716.

[26] [1951] 1 All E.R. 121.

The insurance company cases cited decided only that on a claim for the refund of money paid a distinction was to be drawn between claims based on fraud and claims based on innocent misrepresentation. On the other hand, in *Askey* v. *Golden Wine Co. Ld.*,[33] Denning J. did not doubt that a person might recover for breach of warranty despite the fact that he had been guilty of a crime of absolute liability involving no element of mens rea.

Thirdly, the submission for the defendant that even if one can recover in fraud based on tort one cannot recover for breach of warranty based on contract because the warranty is part of the illegal contract is one which ignores the true nature of a warranty, which, it is submitted, is distinct from though collateral to the illegal contract: see *per* Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton*[34] that the contract and warranty exist independently; see also *De Lassalle* v. *Guildford*[35]; and the definition in the Sale of Goods Act, 1893, s. 62.

Fourthly, the official referee was entitled in law to find that the plaintiffs had not been negligent, for they were dealing with an architect of standing, who had already acted with them in a number of other transactions, and who they were entitled to assume would not deliberately risk an almost certain prosecution for carrying out unlicensed work. In any event, if the court concludes that the plaintiffs relied implicitly on the warranty, the fact that they were negligent in not demanding to see the licences themselves would not bar them from recovering damages for the breach of warranty.

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[27] [1899] 1 Q.B. 816.

[28] Ibid. 828.

[29] [1919] 1 K.B. 520, 539; 35 T.L.R. 245.

[30] [1933] 1 K.B. 822; 49 T.L.R. 254.

[31] [1954] 1 Q.B. 29, 39.

[32] [1913] 2 K.B. 220.

[33] 64 T.L.R. 379; [1948] 2 All E.R. 35.

[34] [1913] A.C. 30, 47.

[35] [1901] 2 K.B. 215; 17 T.L.R. 384.

Dingle Foot Q.C. in reply. The proposition that the illegal contract can be separated from the warranty and that relief may be given for breach of the latter is untenable. It ignores the nature of a warranty, which is not a collateral contract but only collateral to the main object of the contract: see definitions in Anson on Contract, 19th ed., p. 328.

If the present case is to be distinguished from the authoritative cases on building licences because the building owner is here also the architect it will mean that in every such case the court will have to examine the precise relationship between builder and building owner.

[ROMER L.J. It is a remarkable circumstance that this defendant seeks to say that the builders were negligent because they trusted him to get the licences.]

[BIRKETT L.J. The law cannot be that a man should be able to say that if he does not get a licence and yet has the work done he will be able to have it done for nothing.]

The defence is based on the public policy as laid down in the regulations. *Gregory* v. *Ford*[36] is distinguishable, for the primary duty to insure a vehicle is on the employer-owner and there is no such duty in the servant, whereas in regulation 56A the duty is laid on all three parties.

DENNING L.J. The plaintiffs, Strongman (1945) Ld., are builders in the county of Cornwall. Two practical men, Mr. George and Mr. Williams Nicholls, are directors of the company. The defendant, Mr. Sincock, is an architect. The builders claim against the architect for building work which they have done for him. The architect admits that the work was done, but he says that the plaintiffs are not entitled to be paid because it was all done illegally.

The architect has no merits at all. In addition to being an architect he was the owner of some buildings in Cornwall, and he employed the builders to convert these buildings into modern dwellings. One was at Penpol, and the other at Greatwood,

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[36] [1951] 1 All E.R. 121.

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Mylor. The work done was of the value of £6,359. Licences were obtained for only £2,150. The architect says that the builders cannot recover anything above the licensed figure because it was unlawful. It comes ill from him to say this, when on his own admission he sold these converted dwellings altogether for a sum of £10,650. He said in evidence: "If I paid the plaintiffs "for the work they have done, I should have been left with "a very handsome profit." Not only does he wish to keep that profit, but he also wishes to avoid payment of some £4,000 to the plaintiffs on the ground that it was an unlawful contract. But if the defence is good in law, effect must be given to it.

Let me say first that the builders cannot sue here on the contract to do the work, which was done in 1948 and 1949. At that time it was unlawful under Defence Regulation 56A for the work to be done without a proper licence. Licences were only in force to the amount of £2,150. When work was done to the value of over £6,000 the builders and the architect were all guilty of an offence for which they might have been prosecuted. Under many decisions in this court it has been held that a builder doing work without a licence cannot recover under the contract.

The builders seek to overcome this objection by saying that there was a warranty, or (putting it more accurately) a promise by the architect that he would get supplementary licences, or that if he failed to get them he would stop the work. The builders say that on the faith of that promise they did the work, and as the promise was broken they can recover damages in respect of it.

The first question raised before us was whether there was such a promise, or warranty, as it was called. On this point the finding of the official referee was this: "I am satisfied that "when the plaintiffs agreed to do work for the defendant he "assured them that he would get all licences which were neces-"sary, and that if the work exceeded the amounts of the original "licences he would apply for supplementary licences. I am "also satisfied that he said that if he failed to get a supplemen-"tary licence he would instruct them to stop work. Consequently "I regard the plea of warranty as being well founded." That seems to me to be a finding of fact which is decisive. Applying the test which Lord Moulton laid down in *Heilbut, Symons & Co.* v. *Buckleton*,[1] the assurance given by the architect amounted to a collateral contract by which the architect promised that he would get any necessary supplementary licences or, if he could not get them, that he would stop the work.

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[1] [1913] A.C. 30, 50.

The second question is whether the builders can recover in law on this collateral promise. The promise itself was not illegal, but it is said that damages cannot be recovered for the breach of it. It is said that, if damages could be recovered, it would be an easy way of getting round the law about illegality. This does not alarm me at all. It is, of course, a settled principle that a man cannot recover for the consequences of his own unlawful act, but this has always been confined to cases where the doer of the act knows it to be unlawful or is himself in some way morally culpable. It does not apply when he is an entirely innocent party. Take a case where a master sends out his servant to drive a lorry, and the servant has an accident and injures a third person on the road. It then turns out that the master had not taken out a proper insurance policy to cover them. Both master and servant are guilty of an offence under the Road Traffic Act, 1930, but, nevertheless, the servant, if sued for damages, can claim an indemnity against the master. The reason is because the master impliedly promises that he will not ask the servant to do anything unlawful. The master having broken that promise, the servant can recover against him, although the servant was himself guilty of the criminal act of driving without being insured. That was decided in *Gregory* v. *Ford* [2] by Byrne J. Another case occurred recently where a man hired a car for a day, and the lender represented to him that it was insured. He said that the insurance cover was in the right front compartment in the car. The borrower did not trouble to look at it. He relied on what he was told by the lender. There was an accident, and it turned out that the policy was not in force. The hirer and the lender were both guilty of a criminal offence under the Act, but the innocent hirer was entitled to recover indemnity from the lender as upon a warranty or promise that there was a valid policy in force to cover him. That was decided by Roxburgh J. in *Road Transport and General Insurance Co. Ld.* v. *Irwin and Adams*,[3] on March 9, 1955. Finally, take the instances which were given by Kennedy J. in his celebrated judgment in *Burrows* v. *Rhodes and Jameson*.[4] In that case Cecil Rhodes was being sued by one of the men who had been enlisted for the Jameson raid. It was held that, although the

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[2] [1951] 1 All E.R. 121.

[3] Unreported. March 9, 1955.

[4] [1899] 1 Q.B. 816; 15 T.L.R. 286.

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STRONGMAN (1945) LD. *v.* SINCOCK.

Denning L.J.

plaintiff was guilty of a criminal offence under the Foreign Enlistment Act, 1870, nevertheless he could sue Cecil Rhodes and Jameson for fraud in inducing him to go on the raid. In the course of his judgment Kennedy J.[5] took the case where a licensee of a public house is induced to supply liquor to a man not knowing that the man is intoxicated. He is so induced by the false representation of another. The publican is guilty of an offence, but he can recover over against the person who deceived him. Kennedy J. had there in mind, no doubt, an action of fraud, but it is clear from a passage of the report in *Burrows* v. *Rhodes*[6] that he put the breach of warranty on the same footing as deceit. On these authorities, I think the law is that, although a man may have been guilty of an offence which is absolutely prohibited so that he is answerable in a criminal court, nevertheless if he has been led to commit that offence by the representation or by the promise of another, then in those circumstances he can recover damages for fraud if there is fraud, or for breach of promise or warranty if he prove such to have been given, provided always that he himself has not been guilty of culpable negligence on his part disabling him from that remedy.

Mr. Dingle Foot referred us to the observations of this court in *In re Mahmoud & Ispahani.*[7] On a consideration of that case it seems to me that the court only decided that no action lay upon the contract for the purchase of goods. They did not decide whether there was an action for fraud or breach of promise or warranty: and I do not think that their observations were intended to express any view on the matter.

The third question is whether the plaintiffs were guilty of negligence. I can well see that if there was culpable negligence on the part of the person seeking damages, he might not be entitled to recover. In *Askey* v. *Golden Wine Co. Ld.*,[8] some merchants had been guilty of culpable negligence in not taking proper steps to see whether a liquor was safe for consumption, and they were not allowed to recover. I said[9]: "If they "were allowed to be negligent and yet recover damages, it "would offer an inducement to them to turn a blind eye to "contamination." So, in any of these licensing cases, if the builder were negligent and yet were allowed to recover damages, it would be an inducement to him to turn a blind eye to the statute. That is what I had in mind in *J. Dennis & Co. Ld.* v. *Munn* [10] and the other cases to which Mr. Dingle Foot referred us. When a builder is doing work for a lay owner—if I may so describe him—the primary obligation is on the builder to see that there is a licence. He ought not simply to rely on the word of the lay owner. He ought to inspect the licence himself. If he does not do so, it is his own fault if he finds himself landed in an illegality. But in this case there was not a lay owner. The owner was the architect, and he himself said in evidence: "I agree that where there is an architect it is the "universal practice for the architect and not the builder to get "the licence." No fault, it seems to me, can, in these circumstances, be attributed to the builder.

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[5] [1899] 1 Q.B. 816, 831.

[6] Ibid. 828.

[7] [1921] 2 K.B. 716; 37 T.L.R. 489.

[8] 64 T.L.R. 379; [1948] 2 All E.R. 35.

[9] [1948] 2 All E.R. 35, 39.

It was contended before us by Mr. Dingle Foot that on the facts of this case there must have been negligence and that in point of law the official referee ought to have found it. I think not. The official referee found: "I do not consider that the "plaintiffs in the present case have done an immoral act, nor "were they negligent in not insisting on the production of supple- "mentary licences. They had done a great deal of other work "for the defendant without any question being raised with regard "to the sufficiency of the licences."

As I said at the beginning of this case, it comes very ill from the mouth of the defendant to raise this point as against the plaintiffs. His attitude was well shown by an observation which he made to the solicitor, Mr. Ratcliffe. He said: "If "the Nicholls can be bluffed they deserve to lose their money." In other words, he was saying: "If they were fools enough "to trust in me, they ought to lose their money." That is a very wrong attitude for a professional man, an architect, to take up. It shows quite clearly that on his own admission he has misled them and now seeks to turn it to his own advantage. In my judgment, his objection fails. On the findings of the official referee, the plaintiffs were entirely innocent people who were led into this unfortunate illegality by the representation of the architect, amounting to a collateral contract, that he would get the licences. That contract not having been fulfilled, I see no objection in point of law to the plaintiffs recovering the damages, and I think that the appeal should be dismissed.

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[10] [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616.

BIRKETT L.J. I am entirely of the same opinion. My Lord's judgment has covered all the essential facts of the case and the law applicable thereto. I must express my satisfaction at being able to come to this conclusion. My Lord has spoken of the acknowledgment of Mr. Dingle Foot that he came here without merits. It was quite clear as the argument proceeded that he was not merely without merits but had a considerable quantity of demerits. I think, while these courts are still called the Royal Courts of Justice, that it is a very good thing that in almost every case where a litigant comes without merit the court does its very best to see that justice is done so far as possible. If the law decrees that such and such a course must be taken, it must be taken. In the eighteenth century when the criminal law was very barbaric, when, for example, the stealing of 40s. was punishable by death, judges encouraged juries to find that very valuable material was only worth 39s. 11d., because they felt that otherwise justice would not be done. During the long years when the doctrine of common employment was operative in the courts, it never was raised in any case without the judges expressing their abhorrence of that doctrine.

When there is a case in this court where an appellant says: "I knew perfectly well what the law was: I knew if these "people could be bluffed it would be to my advantage and they "would deserve it," it becomes a very difficult task for any counsel to present a case and say that it ought to succeed.

The first point which was taken by Mr. Dingle Foot was that the official referee ought never to have found a warranty and that there was no real evidence to support it. I should have thought myself, whether the word "warranty" is strictly the correct term to apply or whether it should be more properly called a collateral contract on which the plaintiffs relied, that there was abundant evidence that the official referee was right. The evidence of Mr. Ratcliffe, the solicitor, is evidence of the most powerful kind. He said: "In December of 1949 I had "a conversation with the defendant on the telephone." In that telephone conversation, according to Mr. Ratcliffe, the defendant said: "The Nicholls are in my hands." Mr. Ratcliffe said: "'What do you mean by that? The Nicholls have told me "'that you promised to get the licences.' He agreed with me," said Mr. Ratcliffe, "that he had made the arrangement with "the Nicholls to obtain the supplementary licences." Then Mr. Ratcliffe said: "I pressed him again and asked whether I "could be assured and that he had done what he promised he "would do, namely, get the supplementary licences. He would "give me no straight answer except that he said that the licences "were all right. He then made this observation. 'If the Nicholls "'can be bluffed they deserve to lose their money,' or words "to that effect."

Later, when he was cross-examined, Mr. Ratcliffe said: "I "said that the Nicholls brothers told me that the defendant had "promised them to get the supplementary licences. I asked "the defendant whether the position was in order. He said it "was." There was no cross-examination to suggest that no such conversation took place.

When the architect gave evidence, he said that he had no recollection of any such conversation at all. When the official referee took up that matter with him he was emboldened to say: "That is a complete invention." We know that the official referee said: "I accept the evidence of the plaintiffs and I do "not accept the evidence of the defendant." So the situation really was that there was evidence of the existence of this promise from the lips of the defendant himself, if Mr. Ratcliffe was to be believed. I think that there is no real trouble on the first point raised by Mr. Dingle Foot that there was in fact no evidence on which the official referee could come to his conclusion.

With regard to the subsequent points, they have been considered by Denning L.J. and it would be mere surplusage to go through them again. The judgment of Byrne J., the judgment of Roxburgh J., the judgment of Kennedy J. and in particular the two illustrations which he used to adorn his judgment, support the view that my Lord has already expressed.

There is one concluding observation that I desire to make. Mr. Dingle Foot suggested that if this method of suing on a warranty could be successfully raised the whole purpose of the regulation would be defeated. The position with regard to that is that, on the law as stated by Denning L.J., while it is perfectly plain that it is impossible to sue on a contract for the reasons given, where the particular facts of any one case do permit the finding that a collateral contract in fact existed, I can see no special reason on the special facts of that case why that particular cause of action should not succeed, even if it does mean that it puts one virtually in the same position as one would be in if one were able to sue on the contract. One is not suing on the original contract, but on the collateral contract or warranty, so called, and is receiving the damages which arise therefrom. I cannot think that merely because, in effect, one obtains the result which is prohibited (because one cannot sue on the contract at all) it thereby vitiates this procedure altogether. The number of cases of this nature which will arise will not be many. It will be a very rare thing in any case for a defendant to say, as the defendant said in this case, "I agree that where there "is an architect it is the universal practice for the architect "and not the builder to get licences." The judgments of Denning L.J. in some earlier building cases have been cited; but it seems to me that a doctrine of that kind makes the clearest distinction between the kind of case to which he was referring and the kind of case which we have had before us today. I agree with the judgment delivered, and the appeal should be dismissed.

ROMER L.J. I also fully agree, and only mention one subsidiary point which Mr. Dingle Foot put on the question of warranty, which was rejected by the official referee, and which was to some extent relied on before us. That was to the effect that an architect cannot give a warranty because he is not in a position to obtain a licence as of right. The official referee rejected that contention, and I agree with him in rejecting it. A man can give a warranty although he cannot carry it into effect. There is no ground for criticising the referee's finding on that score.

Appeal dismissed.
Order for payment out of £3,400 in court to the respondents.

Solicitors: *Robbins, Olivey & Lake for Nalder & Son, Truro; Ratcliffe, Son & Henderson, Falmouth.*

M. M. H.

FRISH LD. *v.* BARCLAYS BANK LD. AND ANOTHER.

C. A.

[Plaint No. L. 382.]

1955
July 14, 15.

Evershed M.R., Jenkins and Parker L.JJ.

Landlord and Tenant—Act of 1954*—Business premises—Application for a new lease—Application opposed by trustee landlords—Intention to grant lease to beneficiary under discretionary trusts—Whether right of tenant displaced—"Beneficiaries under the trust or any "of them"—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 30 (1) (*g*), 41 (2).

By the Landlord and Tenant Act, 1954, s. 30: "(1) The grounds "on which a landlord may oppose an application under subsection "(1) of section 24 of this Act are such of the following grounds "as may be stated in the landlord's notice . . . that is to say ". . . (*g*) . . . on the termination of the current tenancy the "landlord intends to occupy the holding for the purposes, or "partly for the purposes, of a business to be carried on by him "therein . . ."

By section 41 (2): "Where the landlord's interest is held on "trust the references in paragraph (*g*) of subsection (1) of section 30 "of this Act to the landlord shall be construed as including "references to the beneficiaries under the trust or any of them . . ."

Tenants of business premises applied under the Act of 1954 for the grant of a new tenancy. The freehold reversion was vested in trustees on trust for sale, the income of the proceeds of sale being held on discretionary trusts for a number of persons. One of the objects of the discretionary trusts had entered into an agreement with the trustee landlords to take a tenancy of the premises at a rent in excess of that paid by the tenants. The trustee landlords objected to the grant of a new tenancy to the tenants on the ground of paragraph (*g*) of subsection (1) of section 30:—

Held, (1) that some limit must be put upon the meaning of the words "the beneficiaries under the trust or any of them" in section 41 (2) and that any person having any beneficial interest in the premises however remote was not entitled under paragraph (*g*) to oppose the grant of a new tenancy; the beneficiary who intended to occupy must have such interest under the trusts as either to entitle him to be put in occupation, or, at all events, to justify trustees on his application, if they thought fit to do so, in letting him into occupation.

(2) That, since the trustee landlords were proposing to grant a tenancy to an individual, who happened to have a beneficial interest as one of the objects of a discretionary trust, and that individual's occupation would have no reference at all to his beneficial interest, which could not of itself give to him any right of occupation, the landlords' objection based on paragraph (*g*) of subsection (1) of section 30, as applied to trusts by subsection (2) of section 41, was accordingly not made good.

Quaere whether, if trustees, in the exercise of their discretion, determined to permit a beneficiary who was an object of discretionary trust to occupy premises, the intention of such beneficiary to do so would be within section 30 (1) (g), as applied by section 41 (2).

APPEAL from Judge Andrew, sitting at Bow County Court.

The appellants, Frish Ld., had been tenants of No. 89, High Street North, East Ham, Essex, where they carried on a fried fish business, since 1940, when a lease of the premises granted in 1932 at a rent of £300 per annum was assigned to them. On the expiration of that lease, they applied under Part II of the Leasehold Properties (Temporary Provisions) Act, 1951, for the grant of a new tenancy. In November, 1953, an order was made for the grant of a new tenancy of the premises for one year from September 29, 1953, at a rent of £750 per annum. On August 5, 1954, the tenants made a second application under the Act of 1951 for a further year's tenancy, which was duly granted to them. On October 11, 1954, they requested the respondents, Barclays Bank Ld. and Charles Aukin, their landlords, to grant to them a new tenancy pursuant to the provisions of the Landlord and Tenant Act, 1954.

By a conveyance dated November 11, 1938, Mr. Nathan Parnes, as settlor, had conveyed the freehold reversion expectant on the lease of the premises to the landlords upon common form trusts for sale and to hold the proceeds of sale upon the trusts of a settlement of even date. By that settlement the landlords were directed to hold the income of the net proceeds of sale upon discretionary trusts for Mr. Parnes, his children and issue.

Mr. Parnes wanted to obtain possession of the premises in order to carry on business there. On October 14, 1954, he addressed to the landlords a communication in the following terms: "I Nathan Parnes," then the address followed, "declare "that it is my desire and intention to carry on business at the "premises 89 High Street North, E.6, now occupied by Frish "Ld. 2. I request you to take the necessary steps to terminate "the tenancy of Frish Ld. and to endeavour to obtain possession "of the property. 3. I undertake that if possession of the "premises is obtained I will pay to you such sum as the tenants "may be entitled to as compensation and I will take up a lease "of the premises from you for the term of seven years from the "date upon which vacant possession is obtained at a rent of "£1,000 per annum and containing the same terms (with the "necessary modifications) as the terms contained in the tenancy "of Frish Ld."

On October 20, 1954, the landlords gave notice to the tenants pursuant to the provisions of section 26 (6) of the Landlord and Tenant Act, 1954,[1] that they would oppose an application to the court for the grant of a new tenancy. The ground of their objection was that specified in section 30 (1) (*g*) of the Act, as applied by section 41 (2) to premises held on trust, namely, that Mr. Parnes, as beneficiary under the trusts affecting the premises, intended on the determination of the tenants' tenancy to occupy the premises himself for the purpose of a business to be carried on by him.

The tenants applied to the county court for the grant of a new tenancy of the premises pursuant to Part II of the Act of 1954. The county court judge dismissed their application.

The tenants appealed.

G. Avgherinos for the tenants. The landlords oppose the grant of a new tenancy on ground (*g*) in section 30 (1) of the Act of 1954, as applied by section 41 (2) to the case where the landlords' interest is held in trust, contending that Mr. Parnes' proposed occupation will be an occupation by a beneficiary under the trusts affecting the reversion. It is submitted: first, that in section 41 (2) the reference to "beneficiaries" covers only the case of a beneficiary who, under the trusts, is entitled to possession of the premises; secondly, that it does not cover the case where a beneficiary is not entitled to be let into possession but it is proposed to let a beneficiary into possession under a tenancy granted by trustees. In the present case, the trustee landlords could not let Mr. Parnes into possession, except in breach of trust, since he is only an object of discretionary trusts. Section 41 of the Act is designed to meet the case where the legal estate is in trustees but the entire beneficial interest is in some other person. Section 41 (1) makes it clear that where a beneficiary is in possession, he must be in possession in right of his beneficial title. If it is held that section 41 (2) includes any beneficiary under trusts affecting the reversion, absurd results would follow. A person with only a contingent reversionary interest might claim to be a beneficiary. The beneficiary referred to in section 41 (2) must be limited to beneficiaries who have a right to occupy the premises.

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[1] Landlord and Tenant Act, 1954, s. 26 (1): "A tenant's request for a "new tenancy may be made where the "tenancy under which he holds for the "time being (hereinafter referred to "as 'the current tenancy') is a "tenancy granted for a term of years "certain exceeding one year, whether "or not continued by section 24 of this "Act, or granted for a term of years "certain and thereafter from year to "year. . . .

(6) "Within two months of the "making of a tenant's request for a "new tenancy the landlord may give "notice to the tenant that he will oppose an application to the court for "the grant of a new tenancy, and any "such notice shall state on which of "the grounds mentioned in section 30 "of this Act the landlord will oppose "the application."

S. 30 (1): "The grounds on which "a landlord may oppose an application under subsection (1) of section "24 of this Act are such of the following grounds as may be stated in "the landlord's notice . . . under subsection (6) of section 26 thereof, "that is to say . . . (*g*) subject as "hereinafter provided, that on the "termination of the current tenancy "the landlord intends to occupy the "holding for the purposes, or partly "for the purposes, of a business to "be carried on by him therein, or "as his residence."

(2) "The landlord shall not be "entitled to oppose an application "on the ground specified in paragraph (*g*) of the last foregoing "subsection if the interest of the "landlord . . . was purchased or "created after the beginning of the "period of five years which ends "with the termination of the current "tenancy. . . ."

S. 41 (2): "Where the landlord's interest is held on trust the references "in paragraph (*g*) of subsection (1) of "section 30 of this Act to the landlord shall be construed as including "references to the beneficiaries under "the trust or any of them; but, "except in the case of a trust "arising under a will or on the "intestacy of any person, the reference in subsection (2) of that section to the creation of the interest "therein mentioned shall be construed "as including the creation of the "trust."

L. A. Blundell for the trustee landlords. What the tenants are seeking to do is to read into section 41 (2) some words limiting the scope of the phrase "beneficiaries under the trust or any of "them." The court must give effect to the language which Parliament has used. If the tenants are right, the advantage of section 41 (2) will be unduly curtailed, since it will not apply where there is no beneficiary entitled to occupy the trust premises as of right. The fact that it is for the trustee landlord to oppose a tenant's application for a new lease protects a tenant from claims by beneficiaries only remotely interested in the property. Their desire to obtain possession would not be supported by trustee landlords. An intention to occupy by any beneficiary entitles landlords to object under paragraph (*g*). It is for trustee landlords to choose between the competing claims of different beneficiaries to occupy. The language is sufficiently wide to include both beneficiaries contingently interested and beneficiaries interested under discretionary trusts. The wide meaning of "beneficiaries" appears from the construction put on section 37 of the Trustee Act, 1850, in *In re Sheppard's Will Trusts*.[2]

If Parliament intended to distinguish between a principal beneficiary and other beneficiaries, it would have done so, as it has done in section 33 of the Trustee Act, 1925. There is nothing to prevent trustees in their discretion from allowing one beneficiary entitled under discretionary trusts to occupy the trust premises. The fact that the trustees might subsequently revoke any permission given to a beneficiary to go into possession is not material in construing section 41 (2). There is nothing in section 41 (1) to differentiate the case of a beneficiary in possession who has a substantial interest under the trusts and one who has not. The county court judge was right in holding that Mr. Parnes was a beneficiary within section 41 (2).

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[2] (1862) 4 De G.F. & J. 423.

G. Avgherinos in reply. It is not correct to say that the person to oppose the tenant's application must be the trustee landlords. Any person interested can intervene to do so. The fact that there is no express limitation in section 41 (2) of the meaning of "beneficiaries" does not mean that no such limitation exists. That there must be some limitation is implicit in the context. Only one person can claim. The beneficiary who could only occupy in breach of trust must be eliminated. That leaves as the only beneficiary who can take advantage of paragraph (*g*) the beneficiary who is entitled as of right to occupy the premises under the trusts. Such a limitation, imposed by the context, gives effect to Parliament's intention. Any other construction would lend itself to abuse by persons whose beneficial interests were of a limited nature.

EVERSHED M.R. This case raises another question under the terms of the Landlord and Tenant Act, 1954. The question is in its nature a short one, depending upon the effect, in the end of all, of relatively few words in section 41 (2). Before I read those words I will state who are the parties to the present proceedings and how the matter has come before the court.

The appellants in this court, who were applicants in the court below, Frish Ld., are tenants who have occupied for some years the premises here in question in High Street North, East Ham. The appellants have occupied those premises for the purposes of a fried-fish business under a lease which, after an extension granted under the Leasehold Property (Temporary Provisions) Act, 1951, would, in the ordinary case, have come to an end in 1955. The application dated October, 1954, sought the grant of a new tenancy for 14 years from May 1, 1955. The respondents in this court, Barclays Bank Ld. and Charles Aukin, are together the landlords, as it is conceded, for the purposes of Part II of the Act of 1954; that is to say, they are persons who satisfy the terms of the definition section, section 44, being the persons who are the owners of the reversion to the applicants' tenancy. There is here no other interest in the premises so far as we know; all the conditions of section 44 (1) are satisfied and, as I understand it, the interest of the respondents, Barclays Bank and Mr. Aukin, is that of freeholders, the freehold being in reversion immediately expectant on the applicants' lease.

As might have been guessed from the fact that Barclays Bank Ld. and Mr. Aukin were jointly the landlords, they in fact are trustees. The trusts on which they hold the premises were created in November of 1938 by a Mr. Nathan Parnes. On that date he conveyed these premises and others to the trustees on trust for sale, in the form now common in conveyancing matters: the trustees to hold the proceeds of sale on a sale and the income until a sale upon the trusts of the contemporaneous settlement. That settlement has no special features. It will suffice if I say that the first trusts as regards the income are discretionary trusts during the settlor's life for a class of persons which, at the moment, consists exclusively of the settlor, Mr. Parnes, and his two children, a daughter Barbara and a son Lawrence Morris, who are now in fact (but were not at the date of the settlement) 21 years of age. Subject to that discretionary trust during the life of the settlor, the trusts of capital are trusts in favour of the settlor's children and remoter issue in what I can fairly call common form.

In that state of affairs, the tenants having made their application under section 24 of the new Act, the landlord trustees proceeded to give notice of opposition thereto; and the ground upon which they seek to oppose the grant in accordance with section 26 (6), is that set out in section 30 (1) (*g*).

It will be convenient if I read that paragraph relating it to the opening words of the subsection: "The grounds on which a "landlord may oppose an application under subsection (1) of "section 24 of this Act are such of the following grounds as may "be stated in the landlord's notice under section 25 of this Act "or, as the case may be, under subsection (6) of section 26 "thereof, that is to say—. . . (*g*) subject as hereinafter provided, "that on the termination of the current tenancy the landlord "intends to occupy the holding for the purposes, or partly for "the purposes, of a business to be carried on by him therein, "or as his residence." The initial four words "subject as here-"inafter provided" in paragraph (*g*) anticipate subsection (2), which disqualifies an objection of that character, if the interest of the landlord is one of recent acquisition.

In the present case the occupation, which the landlords intend to bring into effect under the terms of that paragraph, is an occupation, the nature of which is most conveniently and accurately stated by reference to a document (which has been called an undertaking) executed by Mr. Parnes, the settlor, and addressed to the landlords on October 14, 1954. It is as follows: [His Lordship read the memorandum, and continued:] At first sight it would appear a far cry, so to speak, from occupation by the landlords as stated in section 30 (1) (*g*), to a proposed occupation by Mr. Nathan Parnes in accordance with the terms of this document. The document itself contains no reference to the fact that Mr. Parnes has any interest under any settlement of which the persons to whom the document is addressed happen to be the trustees. It is an offer, in effect, to take a lease, if the two named persons will grant it, for a term of seven years at a high rent. The rent is greater by 33⅓ per cent. than the rent which the present occupants are paying; and, of course, from the point of view of the trustees, assuming always the financial stability of the offeror, the suggestion is for the grant of a business tenancy upon commercially very advantageous terms. What is said (and this prevailed in the court below) is that Mr. Parnes happens to be a beneficiary under the trusts on which the property is held by the landlords, and that by reason of section 41 (2) (to which I earlier alluded) it therefore follows that occupation by someone who is in fact, or can be shown in fact to be, a beneficiary under the trusts on which the property is held by the landlords amounts to occupation by the landlords for the purposes of paragraph (*g*), even though the intended occupation is in no substantial sense referable to the fact of the beneficial interest of the proposed occupier.

If that is the effect of the parliamentary language, so be it: that is the result; but it would follow that, if it is right, anyone who happens to have, or is able to acquire, so far as I can see on Mr. Blundell's argument, a beneficial interest under the trusts, however remote and contingent, and who then, having acquired that characteristic, can make a commercial bargain with the trustee landlords which is attractive to those landlords, is entitled, if he proves the truth of the intended occupation, to destroy altogether the tenants' rights under the statute to a renewal of his tenancy.

I must now read the terms of the subsection on which this argument rests. Although I shall come back presently to read the first subsection, I will first read subsection (2): "Where the "landlord's interest is held on trust"—and I would pause to say that by those words "the landlord's interest" must be meant the landlord's interest as section 44 defines it, that is to say, the reversionary interest of the landlord as specified in section 44. "Where the landlord's interest is held on trust the references in "paragraph (*g*) of subsection (1) of section 30 of this Act to "the landlord shall be construed as including references to the "beneficiaries under the trust or any of them; but, except in the "case of a trust arising under a will or on the intestacy of any "person, the reference in subsection (2) of that section to the "creation of the interest therein mentioned shall be construed as "including the creation of the trust."

It is those early words that are principally relied upon: "Where the landlord's interest is held on trust the references "in paragraph (*g*) . . . to the landlord shall be construed as "including references to the beneficiaries under the trust or "any of them." It is said, startling though it may appear at first sight, that there is no escape from the conclusion, as a matter of ordinary use of language, that any beneficiary under the trust qualifies, so to speak, as a landlord for the purposes of an objection raised under paragraph (*g*): So that, although the occupation is going to be, in truth, by virtue of a commercial bargain incorporated in a lease, if in fact the occupier is at the relevant date a beneficiary, that suffices.

I will not take time by adding further examples of the extreme length to which, as it seems to me, that argument would lead and to the extent to which persons, whom one would suppose it would have been no part of Parliament's intention to protect, would, nevertheless, be entitled to come in and object to the proposed new tenancy; for I have come to the conclusion, reading that subsection in its context, that is, both of subsection (1) of the same section and also, I think, of the terms of section 42 to which Mr. Blundell referred us, that it is clear that the words "the beneficiaries under the trust or any of "them" must be given some limitation. And I think they must be given, as a matter of fair interpretation of the language, a limitation in this respect; that only those beneficiaries are referred to whose interest under the trust (putting it quite broadly and generally) is such as to give them the right, as against the trustees, to occupy the property, or is such that the trustees may properly within the terms of their trust let them as beneficiaries into possession. In other words, the words " beneficiaries under the trust or any of them " in that context must be limited to persons occupying by virtue of their interest as beneficiaries.

If that view is right, then, as it seems to me in this case, (whatever may happen in other cases) it must follow that the proposed occupation by Mr. Nathan Parnes under the terms of his so-called undertaking altogether negatives the proposition that he is a beneficiary for the purpose of paragraph (*g*). The trustees, so far as I can see, quite properly have made what they think to be—and no doubt rightly think to be—a good commercial bargain for the benefit of the persons interested under the trusts. They make no suggestion—indeed, their whole case entirely disclaims the suggestion—that they are letting, or proposing to let, Mr. Nathan Parnes into possession because he is a beneficiary and by virtue of his rights as a beneficiary. It will be remembered that Mr. Nathan Parnes's only right as a beneficiary under the settlement is as a member of the class in whose favour the discretionary trusts exist during his lifetime, together with, I suppose, a very remote ultimate remainder if all the other interests should fail during his lifetime, so that there would be a resulting trust to the settlor.

I will now go back to section 41 and observe, first, the language of subsection (1): " Where a tenancy is held on trust, " occupation by all or any of the beneficiaries under the trust, " and the carrying on of a business by all or any of the beneficiaries, shall be treated for the purposes of section 23 of this " Act as equivalent to occupation or the carrying on of a " business by the tenant. . . ."

Section 23 is the section which defines the tenancy to which Part II of this Act applies, and it is sufficient to observe that in subsection (1) Part II of the Act " applies to any tenancy where " the property comprised in the tenancy is or includes premises " which are occupied by the tenant and are so occupied for the " purposes of a business carried on " by the tenant.

It is, to my mind, quite plain, with all respect to Mr. Blundell's argument, that subsection (1) of section 41 is dealing, and dealing only, with the case where, although the tenancy is vested in someone who is properly described as the tenant, nevertheless it is found that the tenant himself happens to be a trustee and the premises are actually occupied by, and the business is actually being carried on, not by the tenant trustee himself, but by the beneficiary or beneficiaries, or one of them, for whom the tenant is a trustee. Inevitably, as it seems to me, the occupation by the beneficiary is an occupation which derives its existence from the fact of the trust and the interest of the beneficiary under the trust. It was suggested by Mr. Blundell that section 41 (1) contemplated a beneficiary subtenant, a person being a beneficiary to whom the tenant had granted a subtenancy to put him in occupation. In my judgment, that cannot be right. If there was found in possession AB carrying on a business there and owing his right of occupation to his subtenancy, then that subtenancy would be the tenancy, and the only tenancy, to which Part II of the Act applied.

I therefore approach subsection (2), which deals with the corresponding case of the landlord, bearing in mind that what subsection (1) has said, putting it quite shortly, is that a tenancy shall not be taken out of the Act and lose the benefit of renewal which the Act gives by reason of the circumstance that the actual occupant, the person carrying on the business, is, in truth, a beneficiary under a trust and is doing so because he is such a beneficiary. If that is right, then I think one naturally approaches subsection (2) with exactly the same notion. What the second subsection is doing is not to deprive the landlord of his chance of successful opposition merely because in the case of the landlord's interest, as had been set out in the case of the tenant's interest, the legal and equitable interests are distinct and the actual reversioner, the person who under section 44 is the landlord because he owns the reversion, does so as trustee for someone else, and it is that someone else, by virtue of his beneficial interest, who intends to carry on the business in the future. If one reads this section in its context, that inevitably seems to be the parliamentary intention, and the way in which the subsection is expressed supports that view.

Subsection (2) does not say that for the purpose of paragraph (*g*) the term "landlord" shall be deemed to include, where the landlord is a trustee, all or any of the beneficiaries under the trust. It uses the looser formula: "Where the landlord's "interest is held on trust the references in paragraph (*g*) . . . "to the landlord shall be construed as including references to "the beneficiaries under the trust"; that is to say, shall be construed, so far as is necessary, to make effective the purposes which lie behind the provision. That that form of words is not mere accident is shown by the last of the sections to which I wish to refer, namely, section 42. Section 41 dealt with the case where the existence of trusts might affect the position of one or other of the parties, tenant or landlord; section 42 deals with the common commercial case nowadays of the tenant or the landlord being one of a group of associated companies. Thus section 42 (1), having defined what is meant by a group of companies—and I think the phrase is sufficiently well understood not to make it necessary for my purpose to read that subsection—Parliament then proceeds in subsection (2) to take the case where a tenancy happens to be held by a member of a group: "Where a tenancy is held by a member of a group, "occupation by another member of the group, and the carrying "on of a business by another member of the group, shall be "treated for the purposes of section 23"—the section, it will be remembered, defining relevant tenancies—"as equivalent to "occupation or the carrying on of a business by the member "of the group holding the tenancy. . . ."

That makes it plain, in my view, that what is intended is that the protection for the tenancy is not to be lost by the circumstance that the tenant is company A, but the actual occupant is company B, not by virtue of a subtenancy (because, as I have said in the case of a trust, if there was a subtenancy, then that subtenancy would qualify as the tenancy for section 23), but by virtue of the commercial association between companies A and B.

Then you come to subsection (3), which deals with the case where the landlord happens to be one of a group of companies: "Where the landlord's interest is held by a member of a group "the reference in paragraph *(g)* . . . to intended occupation "by the landlord for the purposes of a business to be carried "on by him shall be construed as including intended occupation "by any member of the group for the purposes of a business "to be carried on by that member."

There, it is to be observed, the language is different from the language in subsection (2) of section 41; and I, for my part, do not think that the difference is merely accidental; that Parliament merely wants, so to speak, to change the words for the sake of a change. What is, in my judgment, clearly being said is, putting it again quite broadly: For the purpose of enabling a landlord to oppose a tenant's claim for renewal, he can say under *(g)* that he wants to occupy the premises himself for his own business; and, if he is one of a group of companies, it is sufficient that he can say: "I want it not for myself to "use it for my business, but for my associated company B and "its business." In that case the essential thing is that the

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associated company B should be such a company as is defined in subsection (1). If it is, the exact machinery whereby the occupation is to be secured is irrelevant. That is why, I think, there is the variation in language between section 42 (3) and section 41 (2). But if the conception is to be uniform—as I feel myself clearly it is—then just as the essential thing by virtue of which the occupation is to be had under section 42 is the qualification as an associated company, so, I think, if the intended occupation is to be that of a beneficiary, it must be shown that it is the intention that he should so occupy by virtue of his quality or right as a beneficiary.

I therefore have come to the conclusion, with all respect to the county court judge, that upon their proper interpretation the essential words in section 41 (2) must be given the qualification I have suggested. However that qualification should be expressed—and it is unnecessary in this case to consider all possible other cases—it seems to me that the consequence must necessarily exclude an opposition based, as this opposition is, upon an intended occupation by a person who, though he happens to be a beneficiary entitled to a limited extent, will occupy under the terms of an intended commercial bargain to which the occupant's, or proposed occupant's, beneficial character under the trust is irrelevant. For those reasons I would allow the appeal upon this matter.

JENKINS L.J. I agree. [His Lordship read sections 26 (1) (6), 30 (1) (2), 41 (2) and continued:] In the present case the landlords, who are respondents in the appeal, hold as trustees under a declaration of trust of the proceeds of sale of the premises in question, the premises having been conveyed to the landlord trustees on trust for sale by a conveyance dated October 11, 1938, and the declaration of trust of the proceeds of sale having been effected, in accordance with the usual practice, by a deed of declaration of trust of even date with the conveyance. Under the trusts of the proceeds of sale and rents and profits until sale declared by that document the trustees are to hold the income of the trust property, which includes other premises besides the premises now in question, upon discretionary trusts for the benefit of the settlor, Mr. Parnes, and his children and remoter issue.

The trustee landlords objected to the grant of a new tenancy applied for by the tenant, on the ground that under paragraph (*g*) of subsection (1) of section 30 of the Act, as applied to cases of trust by subsection (2) of section 41, Mr. Parnes, a beneficiary under the trust, intended to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein. That is the ground of the objection stated by the trustee landlords, but the actual proposal is to grant a tenancy of the premises to Mr. Parnes. The question in this appeal is whether the proposed transaction, that is to say, the granting of a tenancy to Mr. Parnes, Mr. Parnes being a beneficiary in the sense that he is one of the objects of the discretionary trusts, constitutes a valid ground of objection under the provisions of paragraph (*g*).

Mr. Blundell has supported the view taken by the judge to the effect that the objection was well founded by an argument which has all the attractions of simplicity. He says that subsection (2) of section 41 in terms provides that where the landlord's interest is held on trust references in paragraph (*g*) of subsection (1) of section 30 to the landlord shall be construed as including references to the beneficiaries under the trust or any of them. He says that those words read as they stand and in accordance with their literal meaning include all or any of the beneficiaries under the trust, and he says that it matters not what the interest of any person claiming to be a beneficiary may be, provided that it is such an interest that he can properly be termed a beneficiary. He says, therefore, that Mr. Parnes being a beneficiary, his intention to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein has the same force and effect for the purposes of the objection under paragraph (*g*) as if it had been an objection by the trustee landlords themselves, on the footing that they themselves intended to carry on a business on the premises. Therefore, said Mr. Blundell, inasmuch as Mr. Parnes intends to occupy the premises, and inasmuch as the trustees propose to put him in occupation by means of a tenancy granted to him, the objection is sufficiently made out, and it matters not that Mr. Parnes's occupation will be referable, not to any beneficial interest he has in the interest of which the trustee landlords are the legal owners, but simply to his position as a tenant under the tenancy proposed to be granted to him.

Mr. Avgherinos, on the other hand, supporting the tenant's appeal, submits that some limitation must be put upon the wide meaning of the words "the beneficiaries under the trust or "any of them." He says that the beneficial interest contemplated by subsection (2) of section 41 must be a sufficient interest in the premises under the trust to entitle the beneficiary to occupy the premises, or, at all events, such an interest as would justify the trustees in letting the beneficiary in question into occupation.

I agree with Mr. Avgherinos that some limit must be put upon the meaning of the words "the beneficiaries under the "trust or any of them." In my view it is impossible to hold that any person having any beneficial interest in the premises, however remote, can oppose the grant of a new tenancy under paragraph (*g*). I think that the interest of the beneficiary must be an interest under the trust on the strength of which he intends to occupy.

If Mr. Blundell's argument were accepted, the most remarkable consequences would ensue. One might, for example, have a case where the landlord's interest was settled on trust for one person for life, with remainder to another. If Mr. Blundell's argument is right, the reversioner could come forward and meet the tenant's application for a new lease on the ground that he, the reversioner, being a beneficiary by virtue of his interest in remainder, intended to occupy the holding, and thereupon, provided the trustee could be prevailed upon to grant him a new tenancy and, I suppose, to announce to the court his intention of granting such a tenancy, an objection under section 30 (1) (*g*), to the grant of a new lease would be made good.

Again, one might have a case where the interest of the beneficiary, although in possession, was an interest wholly irrelevant to any right to occupy the premises; as, for example, the case of a mere annuitant.

I find it unnecessary to attempt any exhaustive definition of the kinds of beneficial interest which would suffice to satisfy the section, but, as I have said, some limit must, in my view, be put on the wide meaning of the words "the beneficiaries under the "trust or any of them." As some limit must be placed upon the words, it seems to me that in the context, and having regard to the manifest intention of paragraph (*g*), the limit must be, broadly speaking, of the nature suggested by Mr. Avgherinos. That is to say, the beneficiary, who intends to occupy, must have such an interest under the trust as either to entitle him to be put in occupation, or, at all events, to justify the trustees on his application, if they think fit to do so, in letting him into occupation. That would cover, besides the case of an absolute beneficial owner with the legal estate outstanding in a trustee, such interests as that of a life tenant.

In cases of settlements otherwise than by trust for sale no question could often arise, for in general the tenant for life under such a settlement combines in himself for a purpose of this sort the character of trustee and beneficiary. Again, I think, the class of beneficiaries with which paragraph (*g*) is concerned might well include a person entitled to a life interest in the proceeds of sale of the premises, the premises being held on trust for sale as in the present case.

This is a case of a trust for sale, but the person claiming as beneficiary has not got a life interest in the income of the fund. He merely has during his life the possibility of receiving such payments, if any, as the trustees may from time to time think fit to make to him in exercise of their discretion. That nebulous right or spes, as one might almost term it, clearly could not of itself give to this beneficiary any right to occupy the premises. It might conceivably be possible that if the trustees, in the exercise of their discretion, had decided, until such time as they might decide otherwise, to pay Mr. Parnes the income of the holding in question and had further determined that for the time being they would allow him to be in occupation of the premises, treating the rent which the premises would otherwise have realized as set off against payments made, or notionally made, to him in exercise of their discretion, and if Mr. Parnes had then expressed his intention of occupying in accordance with that arrangement, he could have been brought within section 30 (1) (*g*), as applied to trusts by section 41 (2), precarious though his right of occupation might be. But no such arrangement has been proposed by the trustees in the present case. They have not taken the view that they could properly let Mr. Parnes into occupation on terms such as those to which I have referred. Their proposal is simply to grant to Mr. Parnes a tenancy of the premises, and they say that because Mr. Parnes happens to be a beneficiary under the settlement, in the sense that he is one of the objects of the discretionary trust, their intention to grant him a tenancy, and his intention to occupy as tenant, suffice to support the objection under paragraph (*g*). I find it impossible to accept that conclusion. This is not a case where a beneficiary intends to occupy in right of his beneficial interest; it is a case in which trustee landlords propose to grant a tenancy to an individual who, it so happens, has a beneficial interest as one of the objects of a discretionary trust in the proceeds of sale in the premises under the trust for sale. That intended occupation, as it seems to me, would have no relevance at all to the beneficial interest, such as it is, of Mr. Parnes under the settlement—an interest which could not of itself give him any right of occupation whatever.

Accordingly, I take the view that, on the true construction of the section, the objection based on paragraph (*g*) of subsection (1) of section 30, as applied to the case of trusts by subsection (2) of section 41, is not made good, and, in my judgment, in the circumstances of this case the appeal should be allowed.

Parker L.J. I agree and have nothing to add.

Appeal allowed.

Solicitors: *Donald, Darlington & Nice; Aukin, Courts & Co.*

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June 7, 8, 10.
McNair J.

MARTIN-BAKER AIRCRAFT CO. LD. AND ANOTHER v. CANADIAN FLIGHT EQUIPMENT LD.
MARTIN-BAKER AIRCRAFT CO. LD. v. MURISON.

[1953 M. No. 855. 1953 M. No. 856.]

Contract — Termination — Commercial agreement — No provision for determination—Permission to manufacture—Whether presumption of permanence—Whether implication of term for determination—Relationship not intended by parties to be permanent — Contract determinable on reasonable notice.

Contract—Implied term. Presumption—Rebuttable.

Agency — Revocation — Sole selling agent — Expenditure of time and money—Restrictions—Master and servant analogy—Whether agreement determinable summarily.

By an agreement dated August 26, 1951, the plaintiffs, manufacturers of aircraft ejection seats and allied products, agreed "to permit" the defendants, a Canadian company, "to manufacture, sell and exploit" all their products in the American Continent, and not to make any similar agreement with any other party on the American Continent. The agreement contained provisions under which the plaintiffs were to supply the Canadian company with the "know-how" of the manufacture of their products, for the exchange of information by either side with regard to improvements, for the training of technicians and for the inspection by the plaintiffs of the manufacturing processes of the Canadian company. Provision was also made for the payment, every six months, of royalties, and for the plaintiffs to inspect the books, vouchers and records of the Canadian company. The agreement contained no provision for determination.

On March 9, 1954, the plaintiffs entered into an agreement with the defendant M., who was also a director of the Canadian company, whereby they appointed M. "as their sole selling "agent for all their products . . . on the North American "Continent," and M. agreed to use his best endeavours to promote and extend the sale of the products on the maximum possible scale throughout the territory, and, inter alia, not to sell or be interested in any way in the territory in products which might be competitive with the plaintiffs' and to act as general consultant to the plaintiffs concerning the marketing of the products in the territory, while the plaintiffs agreed not to appoint any other person their agents or distributors in the territory. Payment was to be made by commission on orders received, it being understood that "this [commission] will be paid into the business to "expand it." Provision was made whereby, without prejudice to any other remedy which either party might have against the other for breach or non-observance of the agreement, "either party shall "be entitled summarily to determine this agreement" (a) if the other party failed to remedy a breach within 14 days of notice requiring it to do so, and (b) if the other party went or was put into liquidation or made any arrangement with its creditors generally.

The plaintiffs desired to determine both agreements and the Canadian company and the defendant M. contended that they were terminable only by mutual consent:—

Held, (1) that the agreement of August 26, 1951, should not be approached with any presumption in favour of permanence, for notwithstanding that it was a bare permission, or licence, to manufacture, it was a contract in the commercial or mercantile field such as the law merchant would not normally regard as intended to constitute a permanent relationship, but the question whether or not it was determinable depended solely upon the true construction of the contract and should be considered from the common law approach which, where the contract left the matter open, proceeded upon the basis of reasonableness. Upon that basis the agreement was not one which the parties could have intended to be permanent, and, accordingly, there being nothing in the contract inconsistent with that view, the agreement was, on its true construction, determinable unilaterally on reasonable notice.

Dictum of Lord MacDermott in *Winter Garden Theatre (London) Ld.* v. *Millennium Productions Ld.* [1948] A.C. 173, 203; 63 T.L.R. 529; [1947] 2 All E.R. 331 and *Crediton Gas Co.* v. *Crediton Urban District Council* [1928] Ch. 447; 44 T.L.R. 369 applied.

Llanelly Railway & Dock Co. v. *London & North Western Railway Co.* (1873) L.R. 8 Ch. 942; (1875) L.R. 7 H.L. 550 distinguished.

In re Berker Sportcraft Ld.'s Agreements, Hartnell v. *Berker Sportcraft Ld.* (1947) 177 L.T. 420 considered.

Per curiam. Even if the general rule to be applied was that such a contract containing no express provision for determination was prima facie determinable only by mutual consent, the contract was within the wide class of contracts involving mutual trust and confidence which fell within the exceptions to that rule.

(2) That the agreement of March 9, 1954, was not a pure agency agreement and, as such, determinable summarily at any moment, but, looked at as a whole, was an agreement under which the person described as sole selling agent had to expend much time and money and was subject to restrictions as to the sale of other persons' products and fell into the category of agreements analogous to that of a master and servant which was terminable by reasonable notice. The express provisions for summary determination were merely a restriction of the rights of summary determination which always existed in such contracts in certain events which did not take the agreement out of that category, and, accordingly, the relationship created being essentially a commercial relationship and one of confidence and trust, the agreement was determinable on reasonable notice.

Motion v. *Michaud* (1892) 8 T.L.R. 253, 447 distinguished.

(3) That the question of what was reasonable notice was to be determined according to the ordinary principles applicable to the implication of terms into a contract and with regard to the facts as existing at the time when the notice was given and not at the time when the contract was made, and that, in the circumstances, 12 months was reasonable notice to be given for the determination of both contracts.

MARTIN-BAKER AIRCRAFT CO. LD. AND ANOTHER *v.* CANADIAN FLIGHT EQUIPMENT LD.

ACTION.

The plaintiff company, Martin-Baker Aircraft Co. Ld. (hereinafter referred to as Martin-Baker), manufactured aircraft ejection seats and allied products of which the second plaintiff, James Martin, the managing director of the company, was the inventor. On August 26, 1951, Martin-Baker entered into an agreement with the defendants, Canadian Flight Equipment Ld. (C.F.E.L.), a company incorporated in accordance with the laws of Ontario, whereby they agreed "to permit C.F.E.L. to manufacture, sell "and exploit all Martin-Baker products (past, present and future) "—whether covered by patent, registered design or not—in the "American Continent which products will hereinafter be referred "to as 'the products.'" By article 1 Martin-Baker agreed "not to make any similar agreement with any other party on the "American Continent nor will they permit anyone else to manu-"facture or sell any of the products on that continent without "consulting C.F.E.L. and getting their permission and terms as "to the amount payable as compensation . . . ," and to give every facility to have the agreement registered by the American and Canadian Patent Offices. C.F.E.L. agreed not to export the products made by them out of the American Continent without the consent of Martin-Baker. By article 2 Martin-Baker undertook " to supply C.F.E.L. with the ' know-how ' of the manufac-" ture of all their products, all relevant documents covering the " manufacturing, assembling, checking, maintaining. . . ." By article 3 C.F.E.L. agreed that " the supply of information with a " security classification is subject to the approval of the Ministry " of Supply, and that classified information supplied to C.F.E.L. " must be duly safeguarded by them."

Article 4 provided that: " The price payable by C.F.E.L. to " Martin-Baker for all the rights under this agreement shall be as " follows: (i) In the case of Mark I (non-automatic) type ejection " seats for the first 100 seats manufactured the sum of £40 per " seat. For the next 100 seats manufactured the sum of £35 " per seat and for all subsequent seats manufactured the sum of " £30 per seat. (ii) In the case of the automatic type seats for " the first 100 seats manufactured the sum of £80 per seat, for the " next 100 seats manufactured the sum of £70 per seat for " subsequent seats the sum of £60 per seat. (iii) In the case of " other products the amount payable will be 10 per cent. of " Martin-Baker selling price to the Ministry of Supply or if not " sold to the Ministry of Supply then 5 per cent. of the price " chargeable to other customers " payable every six months, and reserved to Martin-Baker the right to have access to the premises, books, vouchers and other records of C.F.E.L. for the purpose of verifying the sales.

Article 5 provided that Martin-Baker should give C.F.E.L. the benefit of any improvements in the design, and that C.F.E.L. " will inform Martin-Baker of any improvement that they consider " expedient, but they will not incorporate such improvements " without the prior permission of Martin-Baker." Article 6 gave Mr. Martin the right at all times to examine the processes of manufacture of the products by C.F.E.L., and obliged Martin-Baker to give technical assistance to C.F.E.L., and, furthermore, provided that C.F.E.L. would be allowed to send technical staff to England to examine methods of production and also to acquire the " know-how " of the manufacture of the products. Finally, the agreement provided that the contract was to be interpreted under English law, and to be considered as an agreement made in England.

The plaintiff company desired, if entitled so to do, to terminate the agreement, and contending that a term should be implied arising from the nature and subject-matter and terms of the agreement, they claimed a declaration (1) that the agreement was determinable by reasonable notice expiring at any time, alternatively on August 26 or February 26 in any year, alternatively on June 30 or December 31 in any year, and (2) that reasonable notice for such determination was six, alternatively 12 months.

The defendants denied that any such term could or should be implied in the agreement, and they contended that upon its true construction the plaintiffs were not entitled to determine the agreement.

During the course of the hearing it was conceded that the plaintiff company was entitled to a further declaration claimed by them that they were entitled on the American Continent themselves to manufacture the products the subject-matter of the agreement without prior consultation with or permission from the defendants.

Martin-Baker Aircraft Co. Ld. *v.* Murison.

Action.

The plaintiff company, Martin-Baker Aircraft Co. Ld. (hereinafter referred to as Martin-Baker), wishing to develop the sale of ejection seats on the North American Continent, arranged for the defendant, R. A. J. Murison, to go out to Canada to set up an organization there. On July 1, 1951, an agreement was entered into between Martin-Baker and the defendant as follows: "(1) Martin-Baker hereby appoint Murison as their sole selling "agent for all their products (hereinafter called 'the products') "on the North American Continent, as from May 1, 1951. "(2) Murison agrees with Martin-Baker as follows (i) to use his "best endeavours through his agents, correspondents or other-"wise to promote and extend the sale of the said products on "the maximum possible scale throughout the territory. (ii) To "notify his agents and correspondents throughout the territory "of their appointment as sole selling agents for the said pro-"ducts. (iii) On obtaining orders for the said products in the "territory to place their orders with Martin-Baker who shall "execute such orders reserving 17½ per cent. commission for "Murison. (iv) Not to sell or be interested in any way in the "territory in products which may be competitive with those "manufactured by Martin-Baker. (v) To act as general con-"sultants to Martin-Baker on all matters concerning marketing "in the territory of the said products."

By clause 3 Martin-Baker agreed with the defendant: "(i) Not to appoint any other person firm or company as their "agents or distributors for the sale of the said products in the "territory, and not to offer for sale or sell the same direct in any "part of the territory. (ii) To refer to Murison all inquiries for "the said products received by them from persons firms companies or bodies carrying on business in any part of the "territory. (iii) To advise Murison their lowest export selling "prices, . . ."

By clause 4: "(i) In the event of Martin-Baker negotiating "manufacturing licences for any of their products in any "countries in the territory Murison shall on request by Martin-"Baker render all assistance in his power in such negotiation. "The net proceeds from all such licences shall be shared between "the parties during the full term of such licences on the basis "of 50 per cent. to Martin-Baker and 50 per cent. to Murison. "(ii) That commission due from Martin-Baker to Murison shall "be payable quarterly." Subclause (iii) provided that if Martin-Baker received an order from a British source for the products for shipment to the territory, they would reserve Murison's commission as in clause 2 (iii), and by clause 4 (iv): "Without "prejudice to any other remedy which either party may have "against the other for the breach or non-observance of the "provisions of this agreement either party shall be entitled "summarily to determine this agreement (*a*) In the event of the "other party committing any breach of the provisions of this "agreement and failing to remedy such a breach within 14 days "of notice requiring it to do so; (*b*) in the event of the other "party going or being put into liquidation or making any "arrangement with its creditors generally." Subclause (v) contained a provision for arbitration.

On March 9, 1954, the agreement of July 1, 1951, was superseded by a new agreement between the parties in precisely the same terms, except that in article 2 (iii) was added the sentence: "It is understood that this 17½ per cent. will be paid into the "business to expand it," and to clause 4 (i) was added: "It is "understood here that any money paid for infringement or other-"wise of patents by the United States Government shall not come "into this category."

The plaintiff company desired, if so entitled, to determine the agreement, and, contending that it was an implied term arising from the nature and subject-matter of the agreement and its terms, claimed a declaration (1) that the agreement of March 9, 1954, was determinable by reasonable notice expiring at any time, alternatively, on any one of the usual quarter days in any year, and (2) that reasonable notice for such determination was six, alternatively 12, months.

The defendant contended that the plaintiffs were not entitled to determine the agreement otherwise than in accordance with clause 4 (iv), but he admitted that, if it was determinable on reasonable notice, 12 months' notice expiring on any one of the usual quarter days would be reasonable.

Both actions were heard together.

Geoffrey Cross Q.C. and *R. J. Parker* for the plaintiffs. The manufacturing agreement of August, 1951, the subject of the first action, is a licence to manufacture and is a contract which in its nature is determinable by either side on reasonable notice. A licence may be perpetual or determinable summarily, but it may also be determinable on reasonable notice. Every case turns upon the construction of the particular agreement and upon its nature, and where it involves mutual trust and confidence and personal relationship between the parties it is determinable unilaterally: see the observations of James L.J. in *Llanelly Railway & Dock Co.* v. *London & North Western Railway Co.*,[1] a case clearly distinguishable on its facts from the present case, and of Lord Cairns L.C.[2] in the same case in the House of Lords. Lord MacDermott in *Winter Garden Theatre (London) Ld.* v. *Millennium Productions Ld.*[3] cut down the generality of the dictum of Lord Selborne in the *Llanelly* case,[4] and there is no heavy onus on the plaintiffs to show that the agreement is determinable. The principles stated in the *Winter Garden* case [5] are not only referable to licences to enter and occupy the land of the licensee but are of general application. The agreement here, to use the words of Lord MacDermott in the *Winter Garden* case,[6] gives "each of the parties a close and lively interest in the conduct "and integrity of the other while the licence lasts," and the court approaches such an agreement expecting to find that it is determinable. In some cases express provisions show that the parties intended the contract not to be determinable except in certain events, as in *In re Berker Sportcraft Ld.'s Agreements, Hartnell* v. *Berker Sportcraft Ld.*,[7] but there are no comparable provisions in this contract, and it falls within the general rule relating to contracts of mutual trust and confidence which

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[1] (1873) L.R. 8 Ch. 942, 950.

[2] (1875) L.R. 7 H.L. 550, 559, 560.

[3] [1948] A.C. 173, 203, 204; 63 T.L.R. 529; [1947] 2 All E.R. 331.

[4] L.R. 7 H.L. 550, 567.

[5] [1948] A.C. 173.

[6] Ibid. 204.

[7] (1947) 177 L.T. 420.

Jenkins J. would have applied in *In re Berker Sportcraft Ld.'s Agreements*[8] but for the express stipulations negativing the general rule.

The agreement is a bare permission or licence; it imposes no obligation on the defendants to do anything. Such a licence is prima facie revocable as a matter of law: see the remarks of Lord Porter in *Winter Garden Theatre (London) Ld.* v. *Millennium Productions Ld.*,[9] and also those of Lord Uthwatt.[10]

It would be strange if the agreement were not intended by the parties to be terminable; were it perpetual it is difficult to see how effect could be given to its provisions. For instance, if the parties became on bad terms with each other, which could occur without breach of the agreement, it would be impossible to give it business efficacy.

If the agency agreement, the subject of the second action, is not terminable on reasonable notice, then it must continue for the life of Murison unless one of the parties is in breach; that state of affairs could not have been in the contemplation of the parties. An appointment of sole agency falls within the remarks of James L.J. in the *Llanelly* case.[11] No inference can be drawn from the provisions for determination in paragraph 4 (iv); they are not comparable to those in *In re Berker Sportcraft Ld.'s Agreements*.[12]

If each of the agreements is determinable on reasonable notice, what is reasonable notice must be considered at the time when notice is given and not at the time when the contract is made. The position under the agency agreement is the same as that in a contract of service. If a contract of service contains express provisions for determination on reasonable notice, what is reasonable notice is determined by the circumstances at the date of the notice and not at the date of the making of the contract. Where there is no such express provision a similar term is implied. [Reference was made to Diamond's Law of Master and Servant, 2nd ed., p. 179, and to *Adams* v. *Union Cinemas Ld.*[13]] If the manufacturing agreement is determinable there is no distinction in principle from the *Winter Garden* case,[14] where a similar term was implied; both are cases where use is permitted without any obligation to use, and any commitments entered into by the licensee go to the length of the notice.

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[8] 177 L.T. 420, 428.

[9] [1948] A.C. 173, 195.

[10] Ibid. 198.

[11] L.R. 8 Ch. 942, 950.

[12] 177 L.T. 420.

[13] [1939] 3 All E.R. 136.

[14] [1948] A.C. 173.

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MARTIN-BAKER AIRCRAFT CO. LD. v. CANADIAN FLIGHT EQUIPMENT LD. SAME v. MURISON.

Sir Andrew Clark Q.C. and *Denys Buckley* for the defendants. The general rule of law is that accurately stated by Lord Selborne in *Llanelly Railway & Dock Co.* v. *London & North Western Railway Co.*[15]—that where a contract contains no express provision for determination it is prima facie determinable only by mutual consent and not unilaterally. There is a wide class of exceptions to that rule, but the exceptions are all cases where some established rule of law relating to the subject-matter of the contract requires it to be deemed to be determinable, either at will or by a fixed length of notice; for example, contracts of partnership, contracts of agency, and licences to enter and occupy the land of the licensor are determinable at will, and contracts of hiring and service and for tenancy of land are determinable by a fixed length of notice or at the end of a fixed period: see the observations of James L.J. in the *Llanelly* case[16] in the Court of Appeal.

In all cases where there is no such established rule of law the general rule applies and can only be varied or excluded when it is essential in order to give business efficacy to the contract to imply some provision for determination and there is nothing on the face of the contract to negative the implication of such an intention by the parties: see the remarks of Lord Wright in *Luxor (Eastbourne) Ld.* v. *Cooper.*[17] A contract falling within one of the exceptions to the general rule but which is excluded from the exception by an indication on its face that the parties did not intend it to be determinable at will, by the relevant fixed length of notice or on the expiration of a fixed period, comes back under the general rule, and the question again is whether it is essential, in order to give business efficacy to the contract, to imply some other provision for determination; that is the explanation of the decision in the *Winter Garden* case.[18] That was a special case of a licence to enter and occupy land, which is prima facie determinable at will; the approach of Lord Porter[19] and Lord Uthwatt[20] was that the parties could not have intended it to be determinable at will and, therefore, it was necessary to imply some term for determination. The opinion of Lord MacDermott[21] is not inconsistent with that view. An examination of the speeches in the House of Lords in that case show that they were limited to that particular class of case—a licence to enter upon and use the land of the licensor—and the particular wording of that contract, and were not intended to lay down any general rule. Nothing was said in the *Winter Garden* case [22] contrary to the principle stated by Lord Selborne in the *Llanelly* case.[23] Lord Uthwatt in the *Winter Garden* case [24] draws an analogy with a tenancy; his decision turns on the fact that licences to occupy land are determinable summarily and that it was necessary to imply a term that it should only be determinable on reasonable notice in order to allow the licensor a locus poenitentiae, or packing up period, so that the licensor had time to take his goods away.

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[15] L.R. 7 H.L. 550, 567.

[16] L.R. 8 Ch. 942, 949.

[17] [1941] A.C. 108, 137; 57 T.L.R. 213; [1941] 1 All E.R. 33.

[18] [1948] A.C. 173.

[19] Ibid. 192.

[20] Ibid. 198.

[21] Ibid. 203.

James L.J. in the *Llanelly* case [25] did not say that all contracts involving mutual trust and confidence were determinable summarily, but that there were contracts to which some rule of law applied whereby they were deemed to be determinable; it is submitted that the exceptions to the general rule listed by him are exclusive. In the *Llanelly* case [26] there was an element of mutual trust and confidence and, as in this case, the licence was permissive. It is submitted that the present case is in pari materia and that the court should apply the dictum of Lord Selborne.[27]

[McNair J. What is the difference in principle between a licence to use land and a licence to use patents?]

Land is in a different category. All occupation of land has special rules and it is an old and specialized branch of the law. If a person occupies land, nobody else can do so, but a licence to use a patent does not exclude the owner from manufacturing, as, for the purposes of this case, has been conceded. A licence to occupy land is always determinable summarily, but there is no such rule of law in regard to any other licence to use. In *In re Berker Sportcraft Ld.'s Agreements* [28] Jenkins J. held that provisions applicable by rule of law to land do not apply to commercial contracts. That decision is relied on as showing that the decision and principles in the *Winter Garden* case [29] relate only to land and not to commercial contracts. In *Crediton Gas Co.* v. *Crediton Urban District Council*,[30] which, again, was a special case, it was held that the contract was revocable, and it is significant that the court did not apply any general principle but merely construed the document in question.

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[22] [1948] A.C. 173.

[23] L.R. 7 H.L. 550, 567.

[24] [1948] A.C. 173, 200.

[25] L.R. 8 Ch. 942, 950.

[26] L.R. 8 Ch. 942; L.R. 7 H.L. 550.

[27] L.R. 7 H.L. 550, 567.

[28] 177 L.T. 420.

[29] [1948] A.C. 173.

[30] [1928] Ch. 447; ibid. 174 (C.A.); 44 T.L.R. 369.

The manufacturing agreement of July, 1951, the subject of the first action, falls under the general rule and is therefore, prima facie, determinable only by mutual consent. Permission to manufacture contemplates manufacture and the raising of finance. Were the agreement terminable at will it would be impossible for the defendants to raise funds and, therefore, far from it being necessary to give business efficacy to the contract, to imply a term for determination on any notice at all would render the contract commercially abortive. It is clear from the face of the contract that no reasonable man could be expected to insert in it such a provision, for no notice could be reasonable. The provisions in regard to the exchange of information, of improvements and in relation to the visits of technicians are all indications that it was not intended to be determinable unilaterally.

The agreement the subject of the second action is a contract of agency and falls within the exceptions to the general rule. There is no element of a master and servant relationship, for it is a contract for an independent agency and as such is determinable summarily without notice. *Motion* v. *Michaud*,[31] where the court held that since the contract was one of independent agency no notice was necessary, illustrates the distinction between a contract of service and a contract of agency. The contract in this case is, however, taken out of the general exception by the express provisions for determination in certain events in clause 4 (iv) which, if it were determinable summarily, would be meaningless. The contract therefore comes back under the general rule and is only determinable if a term to that effect can be implied. Such a term cannot be implied, for it would be inconsistent with the provisions that Murison, on whom the duty is imposed, must put his commission back into the business; business refers back to the business of Martin-Baker, and no provision is made for the return of his commission if the contract is determined. The remarks of Jenkins J. in *In re Berker Sportcraft Ld.'s Agreements* [32] apply to this contract; it seems almost inconceivable that, had the parties intended it to be determinable, they would not have made some provision for the return of the commission.

Geoffrey Cross Q.C. in reply. It is wrong to say that the agency agreement of August, 1954, is in its nature determinable summarily; there is no authority for that proposition. The agent in *Motion* v. *Michaud*[33] was merely a commission agent; there was nothing in the contract in that case of the nature of an engagement and no obligation was put on the agent to devote any time to the business and marketing of the products of the principal. Under the agreement in this case the agent is bound to use his best endeavours and to assist in the marketing of the Martin-Baker products. There is no hard-and-fast line as to what is a contract of engagement, but in each case the agreement itself must be looked at. This is a contract of engagement and in its nature is determinable on reasonable notice.

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[31] (1892) 8 T.L.R. 253; ibid. 447 (C.A.).

[32] 177 L.T. 420, 424.

The decision in the *Llanelly* case[34] can be explained by the statutory background; under the railway legislation then in force the licensees could have obtained the same powers as they did under the licence. There is no warranty for the inference that all references to licences in the speeches in the House of Lords in the *Winter Garden* case[35] are references to licences in connexion with land, and not to licences generally. Lord Porter[36] traced the law back to the judgment of Vaughan C.J. in *Thomas* v. *Sorrell*,[37] quoted by Alderson B. in *Wood* v. *Leadbitter*,[38] who said that a mere licence was in its nature revocable. The words of Vaughan C.J. in *Thomas* v. *Sorrell*,[39] "As a licence to go "beyond the seas, to hunt in a man's park, to come into his "house," and the subject-matter of that case show that he was emphasizing not that licences to use land were in a different category, but that if permission is given to someone to do something which would otherwise be unlawful it was a mere licence and was prima facie revocable. So far as a mere licence to permit user is concerned, there is no difference between a licence in respect of land or a chattel or a patent. Lord Simon expressly points out in the *Winter Garden* case[40] that there is no reason for saying that the only alternative to a perpetual licence is one that is determinable summarily; the third alternative is that it is determinable on reasonable notice, and any licence to deal with property, be it land, chattel or patent, is prima facie revocable. No contract of a commercial nature has been held to be irrevocable except that in *In re Berker Sportcraft Ld.'s Agreements*,[41] and in that case Jenkins J. said [42] that it "would, in all probability, "have been" determinable by notice if it had not been for the express provisions in that case. There are bound to be anomalies in the present case on either view, but the commitments and money spent by the defendants go to the length of notice, because what is reasonable notice depends upon the circumstances existing at the time when notice is given. [Reference was also made to *Tool Metal Manufacturing Co. Ld.* v. *Tungsten Electric Co. Ld.*[43]]

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[33] 8 T.L.R. 253; ibid. 447 (C.A.).

[34] L.R. 8 Ch. 942; L.R. 7 H.L. 550.

[35] [1948] A.C. 173.

[36] Ibid. 193.

[37] (1673) Vaugh. 330, 351.

[38] (1845) 13 M. & W. 838, 844.

[39] Vaugh. 330, 351.

[40] [1948] A.C. 173, 191.

[41] 177 L.T. 420.

McNAIR J. In these two cases certain preliminary points have been brought before me for determination, and the sole issue is whether or not the plaintiffs are entitled to the declarations for which they ask as to their rights under two contracts between them and the defendants which are still running. They have taken the course of applying to this court for declaratory judgments, primarily as to their right of determination of these two agreements, in the hope that the decision of the court on those questions may enable them to guide their future course of action.

In the first action the plaintiffs are the Martin-Baker Aircraft Co. Ld. and James Martin, and they sue Canadian Flight Equipment Ld., a company incorporated under the law of the Province of Ontario, claiming a declaration that they are entitled to determine by reasonable notice a written agreement made between those parties on August 26, 1951. In that action the plaintiff company also claims a further declaration that under the terms of that agreement they are themselves entitled to manufacture their own products in Canada.

In the second action the Martin-Baker Aircraft Co. Ld. are the plaintiffs, and one R. A. J. Murison, who is also a director of Canadian Flight Equipment Ld., is the defendant. In that action the plaintiff company seek a declaration that an agreement in writing of March 9, 1954, is determinable by reasonable notice.

Before I consider the agreements themselves it is right that I should state the background against which these contracts have to be construed, and out of which the contracts arose. James Martin, the personal plaintiff in the first action, was the inventor of a device for self-ejecting pilot seats for use in aircraft. At the time in question there were two types of these seats in use—it is sufficient for me to say that one was automatic and the other not automatic—which Martin and the plaintiff company had been manufacturing in this country for some time. The manufacture of the seats comprised some nine-tenths of the total production of the company, and of those seats some 80 per cent. were supplied direct to the Ministry of Supply. In the Spring of 1951, being moved to develop the sale of these seats on the North American continent, Martin arranged for Murison (who had been in the employment of the English company for some years) to go out to Canada to set up an organization there. In those circumstances on July 17, 1951, Martin, as the managing director and chief designer of the plaintiff company, wrote to a firm of accountants in Canada asking them, in effect, to take the preliminary steps for carrying out this project in Canada. He wrote in these terms: "Mr. Murison, who has been employed by me "for some time, is emigrating to Canada at the end of August or "early in September. He is going there in a dual capacity. He "is my agent for North America and in addition to that he is "getting a manufacturing licence under which he will manufacture ejection seats in Canada not only for the Canadian market "but also for the United States market as well if required. In "order to manufacture he will have to form a company, and "this I would like you to do for him as soon as possible. My "interest in the company is that it will pay me a certain sum "under a licensing agreement and, of course, I am technically "interested not only in the Canadian company, but in any company where my products are being manufactured. I will want "to have access to the factory at all times and see how the "products are being made, and if necessary I will have to make "suggestions where I deem it necessary, but this will be covered "by the actual licence agreement. However, on your part I "would very much like you to assist Mr. Murison by forming a "company straight away as he requires something tangible with "a name. Furthermore we want to draw up and sign the licence "agreement and we are occasionally being asked what the name "of our company in Canada is." Eventually, acting on that instruction, the defendant company, Canadian Flight Equipment Ld., was formed as a company with limited liability under the laws of the Province of Ontario. On July 1, 1951, an agreement was executed between the Martin-Baker Aircraft Co. and Murison, this agreement being for the most part in similar terms to the agreement between the same parties of March 9, 1954, which is the actual agreement upon which I am to pronounce my judgment.

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[42] 177 L.T. 420, 427.

[43] [1954] 1 W.L.R. 862; [1954] 2 All E.R. 28.

[His Lordship read the agreement of July 1, 1951, as set out above and continued:] Murison having been so appointed, in August of 1951 Canadian Flight Equipment Ld. was formed, and on August 26, 1951, there was executed an agreement between the Canadian company so formed of the first part, and James Martin and the Martin-Baker Aircraft Co. Ld. of England, thereafter called "Martin-Baker," of the second part. It is under that agreement that in the first action I have to come to a decision (1) whether the agreement is determinable on reasonable notice, and (2) whether under the terms of that agreement Martin-Baker themselves are entitled to manufacture in Canada.

Having set out the parties, the agreement continues really by way of recital, but not as operative obligation, that Martin-Baker agree to permit the Canadian company "to manufacture, sell and "exploit all Martin-Baker products (past, present and future)— "whether covered by patent, registered design or not—in the "American continent which products will hereafter be referred to "as 'the products.'" Though that sentence occurs in a recital to the agreement, I think it right (and it has been so conceded) that I should treat it as being part of the contractual stipulations between the parties.

That contractual stipulation having been made, the agreement then continues in a series of eight articles to regulate the conditions under which that licence or permission is to be operated.

[His Lordship read the agreement of August 26, 1951, observed that there was nothing in article 5 which provided for any alteration of the fixed sums to be paid by C.F.E.L. for permission to manufacture the seats, and continued:] It will be observed that in the agreement itself not a word is said about how long the agreement is to run, nor is there any express provision as to the method of determination if the agreement is in fact determinable.

Under those two agreements of July and August, 1951, respectively, business was carried on satisfactorily for some years until the Spring of 1954, when, as a result of a certain disagreement which is evidenced in the correspondence which has been read, it was thought desirable—primarily because Martin thought that Murison was getting rather too much out of the agreement and not doing sufficient work under it to earn his commission—that alterations should be made, and the agreement between the company and Murison of July 1, 1951, was superseded by a new agreement of March 9, 1954, between the same parties. The only alterations which were made were these. First, in article 2 (iii) —dealing with the reservation of 17½ per cent. commission for

Murison—there is added the sentence: "It is understood that "this 17½ per cent. will be paid into the business to expand it."

There is nothing in the agreement itself which indicates what is meant by the term "the business," but it seems to me to be legitimate, according to the accepted rules of construction, to have that matter identified by extrinsic evidence, and the extrinsic evidence contained in the correspondence clearly identifies "the "business" as being the business of Canadian Flight Equipment Ld. Therefore one finds now in this agreement of March, 1954, an understanding recorded, if not an obligation, that Murison's commission shall be paid into Canadian Flight Equipment Ld. to expand it.

The only other new provision inserted in the 1954 agreement which was not contained in the 1951 agreement is that in clause 4 (i)—dealing with the question of manufacturing licences in Murison's territory—there is added the sentence: "It is under- "stood here that any money paid for infringement or otherwise "of patents by the United States Government shall not come into "this category"—that is, shall not come into the calculation of the net proceeds from such licences shared between the parties on a 50/50 basis.

Bearing in mind that my task here is to determine the true effect of those two agreements, of August 26, 1951, in the case of the first action, and of March 9, 1954, in the case of the second action, I approach the first problem—which is really common to both actions though the arguments are not entirely similar in each —of whether those agreements or either of them are determinable by reasonable notice, as is contended for by the plaintiffs, or whether (as the defendants contend) they are in their nature permanent, or perhaps more accurately stated, terminable only by mutual consent.

In favour of the argument that they are permanent or terminable only by mutual consent reliance was placed primarily upon the well-known decision of *Llanelly Railway & Dock Co.* v. *London & North Western Railway Co.*[1] Sir Andrew Clark, on behalf of the defendants, relied primarily upon the statement of principle found in two passages in the judgments in that case. I take first the passage in the judgment of James L.J.[2] in these terms: "I start with this proposition, that prima facie every contract "is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination. No doubt there are a great many contracts of that kind: a contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes—all these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relations between the parties."

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[1] (1873) L.R. 8 Ch. 942; (1875) L.R. 7 H.L. 550.

[2] L.R. 8 Ch. 942, 949.

The same thought is expressed by Lord Selborne in the House of Lords [3] where he expresses his view on the matter as a question of principle: "My Lords, an agreement de futuro, extending over a tract of time which, on the face of the instrument, is indefinite and unlimited, must (in general) throw upon any one alleging that it is not perpetual, the burden of proving that allegation, either from the nature of the subject, or from some rule of law applicable thereto. So far as the words go, there is here no limit; and if any limit, or the power of fixing a limit, is to be implied, it can only be in one or other of these two ways. In the present case, the character of perpetuity attaches both to the legal personality of each of the contracting parties," —the two contracting parties being statutory railway companies— "and to the legal character and use of the subject-matter, the railway; and the objects of the agreement are favourably regarded by the law; all such companies having express statutory powers to contract (without any necessary limit of time) for such objects, and being (in the absence of contract) to some extent always under legal obligations, actual or potential, of a like general character.

"All these considerations, so far from introducing any implication from the nature of the subject-matter, or from any rule of law, against the natural import of the unlimited terms (as to time) in which this particular agreement is expressed, tend to confirm the prima facie conclusion that an agreement

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[3] L.R. 7 H.L. 550, 567.

"expressed in such indefinite terms is to have unlimited duration. "The whole circumstances under which this agreement was made, "and its particular terms, support the same conclusion."

On the basis of those two passages and other cases to which I was referred, Sir Andrew formulated the propositions for which he contends—I hope I do him justice—in these words: the general rule is that where the contract contains no express provision for determination it is prima facie determinable only by mutual consent and not unilaterally. There is a wide class of exceptions, but those exceptions are all cases where some established rule of law relating to the subject-matter of the contract requires that that contract is to be deemed to be determinable either at the end of a fixed period, or at will, or by some fixed length of notice.

As an example of the exceptions Sir Andrew classified them as follows: Those determinable by law, such as partnerships, contracts of agency and licences to enter and occupy land. As examples of those which have been decided to be determinable either at the end of a fixed period or by a fixed length of notice, Sir Andrew cites contracts of hiring and service—which one knows by the ancient custom of the realm were deemed to be contracts for a year—and contracts for a tenancy of land, and it is said that if the case falls within the general rule, and not within the exceptions, it can only be taken out of that general rule where it is essential, to give business efficacy to the contract, to imply a term that it shall be determined unilaterally; and further, that there is nothing on the face of the contract which negatives that implication. On the other hand, contracts which fall within the exception may be excluded from the exception if there are indications on the face of the contract that the parties could not have intended that it was to be determinable according to the ordinary rule applicable to that exceptional case.

Accordingly, applying that to the agency agreement in the second case, Sir Andrew argues that that agency agreement being by its nature one determinable summarily, since there are to be found in the agreement itself provisions for determination summarily only in certain events, it is wrong to imply any other method of determination in that agreement than that expressly dealt with by the express terms of the agreement; applying his formulation of principle to the licence agreement, Sir Andrew argues that not only is there no need to imply a term for revocation unilaterally by the one party or the other to give business efficacy to the contract, but that the implication of any such term would stultify and negative the agreement, and not carry it out.

Those are clearly formidable contentions, but the basis of those contentions, as it seems to me, is the whole-hearted acceptance of the views expressed by James L.J.[4] in the Court of Appeal and by Lord Selborne[5] in the House of Lords in the *Llanelly* case.[6] It becomes necessary, therefore, to examine the extent to which those two judgments (1) form the basis of the decision in that case, and (2) have been commented upon in subsequent cases. Without going through the various passages in the speeches in the House of Lords in detail, it is to my mind quite clear that the majority of the House—Lord Cairns L.C., Lord Chelmsford and Lord Hatherley—decided in favour of permanency in that case, not on the basis of any presumption in favour of permanency, but solely upon the terms of that particular agreement; and in particular that they were influenced by the fact that the agreement being one under which the London & North Western Railway Co. obtained running powers over the lines of the Llanelly company, there were at that time in existence statutory provisions under which such an agreement was authorized and under which, if no agreement were reached, the London & North Western Co. could apply to some statutory tribunal and obtain those running powers in invitum the Llanelly company, and in such cases such running powers would be granted for an indefinite time. It was with that statutory background and other examination of the detailed terms of the agreement that Lord Cairns L.C., Lord Chelmsford and Lord Hatherley came to the clear conclusion that that particular agreement was permanent in its terms, and in arriving at that conclusion they did not rely upon the presumption in favour of permanency which was later stated in the final speech by Lord Selborne.[7]

That case was also considered in the House of Lords recently in *Winter Garden Theatre (London) Ld.* v. *Millennium Productions Ld.*,[8] which concerned the licence to use and occupy part of a theatre. The question there was what rights of determination rested in the licensor under the agreement regulating the licence. Lord MacDermott—in whose speech Lord Simon L.C. and Lord Simonds also concurred—approached consideration of the matter in this way[9]: "My Lords, the first question in this appeal is

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[4] L.R. 8 Ch. 942, 948.

[5] L.R. 7 H.L. 550, 567.

[6] L.R. 8 Ch. 942; L.R. 7 H.L. 550.

[7] L.R. 7 H.L. 550, 567.

[8] [1948] A.C. 173.

[9] Ibid. 203.

"whether the licence granted by the appellants was, according "to the contract creating it, revocable when the present dispute "arose. The answer depends, in my view solely, on the true "construction of the letters of June 10, 1942, as ascertained in "conformity with the ordinary principles applicable to the inter-"pretation of written instruments. On this aspect of the case "the respondents relied on the decision of this House in *Llanelly* "*Railway & Dock Co.* v. *London & North Western Railway Co.*,[10] "and, in particular, on the passage in Lord Selborne's speech "which reads," and then he sets out the first paragraph of Lord Selborne's speech which I have already read.

Lord MacDermott continues[11]: "My Lords, when the facts "of that case are examined it is plain that the contract for "running powers which was there held to be permanent in "character had little in common with the contract between the "parties to this appeal, save that in neither instance was express "provision made for revocation by the licensors. In the *Llanelly* "case[12] the agreement not only contained terms which indicated "the construction adopted but, as a perpetual arrangement, it "conferred rights of a kind contemplated by the railway legisla-"tion then in force—a circumstance which Lord Cairns L.C. "obviously regarded as important, for he observed that[13]: 'as "'those other terms, secured by Act of Parliament, would have "'been continuing, so this agreement, carrying more favourable "'terms, appears to me in its nature to be a continuing agree-"'ment.' In the present case there is no such statutory back-"ground and a close scrutiny of what the parties have agreed has "failed to reveal any stipulation which I can regard as manifest-"ing an intention that the licence was to go on for ever if the "licensees so desired. No doubt the dictum of Lord Selborne,[14] "which I have quoted above, is in wide terms. But it is not "expressed as a universal rule of construction (as the cautionary "words 'in general' show) and I doubt very much if it was "intended to have any applicability to circumstances such as "those now under consideration. If it has I would, for my part, "be prepared to arrive at the same conclusion as if it had not, "for, even if an onus rests on the appellants in this matter, the "whole tenor of the letters of June 10, 1942, and the nature of "their subject-matter, seem to me to negative, quite definitely,

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[10] L.R. 7 H.L. 550.

[11] [1948] A.C. 173, 203.

[12] L.R. 7 H.L. 550.

[13] Ibid. 559.

[14] Ibid. 567.

"the idea of irrevocability so strongly urged on behalf of the "respondents."

Lord MacDermott continues, in a passage relied upon by Mr. Geoffrey Cross, in these words [15]: "The expressed purpose of the "licence, the periodic payments, the complete retention of possession by the appellants, the various stipulations which give each "of the parties a close and lively interest in the conduct and "integrity of the other while the licence lasts and, not least, the "provisions of para. (*c*) of clause 6 of the letter agreement as "to the maintenance of the premises and the state and condition "in which they are to be left on the termination of the licence, "all point to this conclusion and away from the notion that the "permission of the appellants was perpetual." I will not continue with the latter part of that speech in which Lord MacDermott deals with the question of the length of notice required. It is also manifest that Lord Porter was at least in some doubt as to the generality of the application of Lord Selborne's [16] proposition for he states [17]: "Whether such a proposition is too "widely stated, though in general it may be true, is not a matter "which, in my opinion, it is material to decide. The other "members of the House gave their decision upon the construction of the document itself and in any case qualified it by "bringing to the inquiry a consideration of the nature of the "subject-matter involved."

Sir Andrew Clark seeks to distinguish the *Winter Garden Theatre* case [18] from the present case by urging that throughout the speeches in that case emphasis was laid upon the fact that the licence agreement there being considered was a licence for the use of land; and it is said that the House of Lords was merely applying the well-settled principle that a licence for the use of land is determinable by one party in invitum. With great respect to that argument I do not so read the speeches. It is clear to my mind that Lord MacDermott [19] at least—whose speech, as I have observed, was concurred in by Lord Simon and Lord Simonds—deals with the question of principle not as being a question of principle applying to the particular licence there involved (namely, a licence for the use of land) but to licence agreements generally. Lord MacDermott states the principle quite clearly, as it seems to me, that whether or not such a contract is determinable depends solely upon the true construction of the contractual documents as ascertained in conformity with the ordinary principles applicable to the interpretation of written contracts.

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[15] [1948] A.C. 173, 204.
[16] L.R. 7 H.L. 550, 567.
[17] [1948] A.C. 173, 195.
[18] [1948] A.C. 173.
[19] Ibid. 203.

Furthermore, I think it plain from the language used by Lord Porter [20] that he, too, is approaching the question as to the revocability of the licence not from the point of view of a licence for the use of land, but of licences generally. That is particularly borne out by his references to the old case of *Thomas* v. *Sorrell*,[21] decided in 1673, and *Wood* v. *Leadbitter*,[22] where Alderson B. referred to *Thomas* v. *Sorrell*,[23] and Lord Porter sums up the matter in these words [24]: "If the contention that licences given "for a consideration are not revocable were confined to a limited "licence to do a particular act or series of acts, I do not think I "should disagree provided the performance of a particular act "had been actually begun. So limited the proposition does not "conflict with the view that normally a licence is revocable."

Accordingly, it appears to me that I have to approach the determination of this question not with any presumption in favour of permanence; and, indeed, if there is any presumption at all, it would seem to me to be a presumption the other way. It is to be borne in mind that this agreement is one in a commercial or mercantile field. No case was cited to me where it has been held that this doctrine of irrevocability applies to a contract in the commercial or mercantile field, and I do not feel that the law merchant would normally look at such an agreement as this as being an agreement intended to constitute permanent relationships. For example, I have little doubt that the law merchant would regard a contract for sale of 100 tons of coal monthly at a fixed price, no period being specified, as a contract determinable on reasonable notice.

The common law, in applying the law merchant to commercial transactions, has always proceeded more on the basis of reasonableness in filling up the gaps in a contract which the parties have made on the basis of what is reasonable, so far as that does not conflict with the express terms of the contract, rather than on the basis of rigidity. There are abundant illustrations throughout the common law authorities which have subsequently found their place in the great codifying statutes of the Sale of Goods Act, 1893, the Marine Insurance Act, 1906, and the Bills of Exchange Act, 1882, where this view of the law merchant has been adopted and provision has been inserted to the effect that where the contract makes no provision for either fixing price or premium or time at which an act has to be performed, then the law is that a reasonable price and reasonable premium or reasonable time will be imported.

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[20] [1948] A.C. 173, 193.
[21] (1673) Vaugh. 330.
[22] (1845) 13 M. & W. 838.
[23] Vaugh. 330.
[24] [1948] A.C. 173, 194.

It is, of course, true that this kind of consideration can in many cases be excluded by express provision; but where the contract leaves the matter open, I think that the common law approach would be to provide a solution which is reasonable. At the same time, of course, I hope I bear in mind that it is not the function of the court to make a reasonable contract between the parties; and in so far as the matter is one of implying terms one can only imply terms which are necessary to give business efficacy to the contract. But to my mind the question whether a contract such as this is permanent or revocable does not depend upon the insertion of an implied term, but depends upon the true construction of the language used. This is certainly the view expressed by Lord MacDermott in the case cited. Accordingly, subject to there being anything in the agreements which is inconsistent with their being revocable, I would favour the view that they are revocable.

An illustration of a case where there is something inconsistent with revocability of such an agreement as this is to be found in *In re Berker Sportcraft Ld.'s Agreements*.[25] In that case Jenkins J. had to consider whether an agreement between Norman Hartnell, the well-known dress designer, and the defendant company to manufacture ladies' garments was determinable on reasonable notice or not. The agreement there, although different in certain terms from the present agreement, has certain features very much in common. In that case (as in the present) the licensee was to make use of the designs of the licensor; and in both cases, it appears to me, the reputation of the licensor might be affected by the goods manufactured by the licensee. In the case of that agreement there was an express provision for determination in certain specified events, namely, in the event of the commission or remuneration under the agreement not reaching a certain specified sum; and it was because of that express provision in the agreement that Jenkins J. took the view that it was not determinable on notice.

I think it quite clear that if those words had not been there the judge would have taken a different view, for he deals with the argument of Sir Andrew Clark in that case in these words [26]: "Mr. Clark in effect says: 'Here is a contract which does "'involve a great deal of trust and confidence and a great deal of "'necessity for being mutually satisfied with each other's con-"'duct, and a certain amount of personal relations and some "'delegation of authority inasmuch as Berkertex, Ld. are "'empowered to affix a label bearing Mr. Hartnell's name to "'the dresses manufactured by them.' It seems to me that that "argument would have very great force if this agreement had "contained no provision for determination at all. Supposing the "only provision as to the duration of the agreements had been "the fact that they were to continue from year to year, I think "the result would, in all probability, have been that, having "regard to the content of the agreements, the court could not "hold that the parties intended to go on for ever and so would "come to the conclusion that they meant them to be determinable "on reasonable notice."

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[25] (1947) 177 L.T. 420.

Before I turn to examination of the agreements themselves I should first refer to the decision in *Crediton Gas Co.* v. *Crediton Urban District Council*,[27] before Russell J. and in the Court of Appeal.[28] In that case, too, the question was whether an agreement under seal for the provision of street lighting was determinable or permanent. It is true that the case was finally decided upon the peculiar facts relating to a prior agreement. But it is interesting to observe that Russell J., in referring to the argument based upon the *Llanelly* case,[29] uses these words [30]: "The contract was a commercial contract. The gas company "was merely getting a customer for its gas. The remarks "of James L.J.[31] and of Lord Selborne [32] do not point to "that class of contract being perpetual. It is true that the "character of perpetuity attaches to the legal personality of each "of the contracting parties, one being a statutory company and "the other a public authority; but it is impossible in these days "when limited liability is the general rule to say that for that "reason a contract, indefinite in point of time, by which a gas "company secured a customer on particular terms, was intended "to be permanent." That reinforces my view that the doctrine has no real application to the case of the ordinary mercantile or commercial contract. I accept also the view which was strongly urged by Mr. Geoffrey Cross that, even if the doctrine laid down by Lord Selborne[33] is to be applied in full, there is a wide class of case—especially those involving mutual trust and confidence—which falls within the exception.

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[26] 177 L.T. 420, 427.
[27] [1928] Ch. 174.
[28] Ibid. 447; 47 T.L.R. 369.
[29] L.R. 7 H.L. 550.
[30] [1928] Ch. 174, 178.
[31] L.R. 8 Ch. 942, 949.
[32] L.R. 7 H.L. 550, 567.

Having arrived at that conclusion as a matter of principle, I turn to the licence or manufacturing agreement. The first thing that one observes is that it is a mere licence, or the operative part of that agreement is a mere licence, to the Canadian company to manufacture, sell and exploit; and accordingly, on the principles which I have adopted, prima facie that licence is terminable. It does not impose any obligation upon the Canadian company to manufacture, sell or exploit any of the Martin-Baker products at all, though it does bar Martin-Baker from entering into any agreement with another party on the American continent to manufacture, sell or exploit if the Canadian company do nothing at all. That alone appears to me to be a consideration which points quite plainly to the view that Martin-Baker cannot have intended that they were to have their hands entirely tied by what may be wholly passive action by the Canadian company. That is one element in this agreement which points strongly in my view to determinability.

I am also influenced by the fact that in article 4, which regulates the royalty rates, no provision at all is made for any variation and, if the defendants' contention is right, those royalty rates would remain at their present figure whatever might be the change in the value of currency. Furthermore, I think it is plain throughout this agreement that there are terms which involve the highest degree of mutual confidence and trust between the two contracting parties, and therefore that it is an agreement which even on the most limited application of Lord Selborne's[34] doctrine would not be permanent, but would be terminable.

On the other hand, the very forceful argument is advanced by Sir Andrew Clark that it is really extremely difficult to believe that anyone in their senses would put up money to bring into existence plant for the manufacture of these special ejection seats unless they had the assurance of some degree of security. That is a matter which I have to weigh in the balance against the other contrary indications that I have mentioned. But applying my best judgment to the matter, it appears to me that the former objections outweigh that forceful contention advanced in favour of permanence. After all, it is the common experience that people who are prepared to put up capital for the development of new business do run risks. It may be that in putting up such capital as was needed to tool up this factory the parties relied not upon their strict legal rights, but on the relationships which had existed up to that time quite happily between them. I have no information at all as to who did in fact provide the capital for the formation or development of this company, nor indeed would that information, I think, be material in arriving at the only decision at which I have to arrive. In my judgment, therefore, that agreement is terminable on notice.

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[33] L.R. 7 H.L. 550, 567.

[34] Ibid.

The next question is: on what notice? According to the speeches in the *Winter Garden Theatre* case[35] (and in particular that of Lord MacDermott),[36] the question of length of notice has to be determined according to the ordinary principles applicable to the implication of terms into a contract. I have to bear in mind, as I have already observed, that this contract does contemplate that money will be put up in the business and that plant will be purchased. I have had very little information placed before me by either party as to the extent of that plant. It seems to me that in the balance sheet for the year ending April, 1954, the plant and machinery after depreciation stand at about £4,000 and there is an estimate that in November the depreciated value of the plant and machinery would amount to some £5,000. So it is not the question of a vast organization.

I should observe that, although it was challenged at one time, I have formed the view that the question of length of notice has to be determined having regard to the facts as existing at the time when the notice is given, and is not to be determined at the time when the contract is made. Applying the best judgment I can on the rather scanty evidence before me, I would say that this contract is determinable on 12 months' notice given at any time.

Before parting with this agreement I should deal also with the second declaration asked for, namely, that the plaintiff company is itself entitled to manufacture in Canada. Entitlement to that declaration is put in issue in the defence by the defendants, but Sir Andrew Clark (in my view quite rightly) conceded that that declaration should be granted on the true construction of the agreement.

I turn now to the question whether the agency agreement of March 9, 1954—to use that term without prejudicing the position

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[35] [1948] A.C. 173.

[36] Ibid. 203.

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v.
MURISON.

McNair J.

for the moment—is also terminable. If it were a pure agency agreement and nothing more, there is much to be said for the view that it would be terminable summarily at any moment. But if an agreement of this nature has to be looked at as a whole, and the whole of its contents considered, and if one finds (as one finds here) that the person who is described as sole selling agent has to expend a great deal of time and money and is subject to restriction as to the sale of other persons' products which may be competitive, it seems to me that it is a form of agreement which falls much more closely within the analogy of the strict master and servant cases where admittedly the agreement is terminable not summarily—except in the event of misconduct—but by reasonable notice.

I was urged to hold that this agency agreement was terminable summarily upon the basis of the decision in *Motion* v. *Michaud* [37] before Day J. and in the Court of Appeal.[38] There it was held that an agreement under which the plaintiff was appointed purely as a commission agent for the sale of the defendants' wines and spirits in France was determinable summarily or at will. Day J. decided that it was so, but in the course of his judgment he said:[39] "There was no evidence of anything in the nature of service or of "a contract only determinable by notice. The plaintiff was an "independent merchant who sold wines for his own profit, and "also sold champagne and beer for other people upon commission, "and he undertook to see what he could do in the way of selling "the defendants' brandies upon similar terms. He was in no "sense their servant, and was not bound to devote any time or "energy to the business on their behalf. No action in the nature "of wrongful dismissal was maintainable in respect of such a "relation."

In the Court of Appeal the judgment of Lord Esher M.R.[40] is very shortly reported, and I cannot find any help in the determination of principle. It appears to me from the language of Day J.[41] that if he had had to consider the case now before me he would clearly have taken the view—having regard to the form of the provisions of the agreement—that, although called an agency agreement, it was determinable only at reasonable notice.

If that conclusion is right, as I think it is, it follows that the provision in article 4 (iv) dealing with the right to determine summarily does not stand in the way of a decision that the agreement as a whole is determinable on reasonable notice. On that view the provision as to summary determination is merely a regulation of or restriction upon the right of summary determination which always exists in certain events even in the case of an agreement ordinarily determinable by notice. Accordingly, bearing in mind that the relationship created here is essentially one of confidence and trust and is essentially a commercial relationship in the mercantile field, I would hold that that agreement was also determinable on reasonable notice.

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[37] (1892) 8 T.L.R. 253.

[38] Ibid. 447.

[39] Ibid. 253.

[40] Ibid. 447.

[41] Ibid. 253.

Against that view, however, it was urged very strongly that, taking into consideration the modification of March, 1954, by which Murison accepted an understanding that he would pay his whole commission into the business—which I have already held means the business of Canadian Flight Equipment Ld.—to expand it, it would be wholly unreasonable that this agency agreement should be determinable. Against that view it is urged by Mr. Geoffrey Cross (it seems to me with considerable force) that if I were to hold that this agreement is not determinable, then Murison, in so far as the article to which I have referred imposed any obligation upon him, would be obliged to pay the whole of his commission into the Canadian company and to do the whole of his work for life for nothing. That appears to me an entirely unreasonable conclusion, and I therefore adhere to the decision which I have reached, namely, that that agreement likewise is determinable on notice.

Although probably as a matter of law the two agreements have to be considered in isolation, for my part I take the view that to do so would be in the highest degree pedantic and artificial, and accordingly I am of opinion that this agreement, too, can only be determined on the same notice as I have already said is applicable to the other agreement, namely, 12 months.

Declarations that the agreements were determinable by 12 months' notice expiring at any time.

Solicitors: *Coward, Chance & Co.; Boodle, Hatfield & Co.*

J. F. L.

C. A.

1955
Mar. 4, 16.

Hodson and
Parker L.JJ.

WALTER & SULLIVAN LD. *v.* J. MURPHY & SONS LD.
SAME *v.* SAME.

Assignment—Equitable—Debt—Enforcement of debt—Building contract—Part of alleged debt—Whether assignor can recover all or part of debt in own right without joining assignee.

The plaintiffs, plaster-work contractors, carried out building work as sub-contractors of the defendants, and claimed from them £1,808 for work done. The plaintiffs had been indebted to their suppliers, H. & Co. Ld., in the sum of £1,558, and an arrangement had been made between the parties whereby the plaintiffs gave the defendants an irrevocable authority to pay to H. & Co. £1,558, and the receipt of H. & Co. for any payment received by them from the defendants was to be a good and sufficient discharge to the defendants for the sums so paid:—

Held, (1) that the arrangement amounted to an equitable assignment by the plaintiffs to H. & Co. by way of charge of £1,558 of the debt alleged to be due from the defendants, and that the assignors, the plaintiffs, could not recover this sum without joining in the action the assignees, H. & Co., who still had an outstanding interest in the debt.

Hughes v. *Pump House Hotel Co. Ld.* [1902] 2 K.B. 190; 18 T.L.R. 654 explained.

(2) Further, that the plaintiffs could not recover from the defendant even the excess over £1,558 of the debt alleged to be due without bringing H. & Co. before the court.

In re Steel Wing Co. Ld. [1921] 1 Ch. 349 followed.

INTERLOCUTORY APPEAL AND CROSS-APPEAL.

The plaintiffs, who were plaster-work contractors, claimed £1,808 from the defendants, who were builders, for work done by the plaintiffs under a contract between the parties. By their defence the defendants pleaded, inter alia, that the plaintiffs had authorized the defendants to pay to Hall & Co. Ld., the plaintiffs' suppliers, the sum of £1,558 from money owing by the defendants to the plaintiffs; that this amounted to an assignment of part of the alleged debt, and that both as regards the £1,558 and any excess no claim lay without the joinder of Hall & Co. Ld. This plea was tried as a preliminary issue before an official referee, who ordered that all further proceedings in the action should be stayed. The plaintiffs appealed and the defendants cross-appealed from the official referee's order merely staying the proceedings.

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

John Perrett for the plaintiffs. The effect of the official referee's finding is to put legal owners of debts or choses in action in exactly the same position as equitable owners when bringing proceedings to recover the debt. The legal owner may always sue in his own name, but an equitable owner must either sue with the authority of the legal owner—join that owner as a co-plaintiff with his consent, or, when the legal owner's authority or consent are not forthcoming, join him as an additional defendant. There is no reported case where a legal owner of a chose in action has been compelled to join equitable assignees.

The effect of the letter of hypothecation in the present case was not to pass all the rights of the assignor. It amounted to a mere letter of hypothecation of a debt so as to charge it in equity: see *In re Kent & Sussex Sawmills Ld.*[1] The letter of charge here follows a common form used by banks and like commercial houses to secure advances and overdrafts. It is the common method of charging book debts. If the defendants' contention is upheld, businesses with their book debts charged to banks will have to join those banks in any proceedings to recover, as otherwise, it is said, the defendants will have a complete defence to the claim.

The defendants are not embarrassed. Until judgment they have been directed to make any payments to the equitable assignees, and the plaintiffs are under an obligation to give them credit for such payments and estopped from denying that such payments are in discharge of this debt. The charge does not concern itself with any judgment, so that upon judgment being obtained the equitable doctrine of merger will operate to extinguish the debt, which will merge in the judgment. Reliance is placed on the dictum of Mathew L.J. in *Hughes* v. *Pump House Hotel Co. Ld.*[2]

R. D. Stewart-Brown for the defendants. If this action is allowed to proceed in its present form the defendants may at any time be sued by Hall & Co. Ld. in separate proceedings for the sum of £1,558. The transaction in question was an equitable assignment, since it was probably by way of charge, and in any event was an assignment of part of a debt only. While an equitable assignee had to join the assignor unless the assignor's presence was dispensed with, the assignee could join an unwilling assignor as defendant and could recover judgment against the debtor:

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[1] [1947] Ch. 177; 62 T.L.R. 747; [1946] 2 All E.R. 638.

[2] [1902] 2 K.B. 190; 18 T.L.R. 654.

William Brandt's Sons & Co. v. *Dunlop Rubber Co. Ld.*[3] The defendants could not be liable for the same sum to two different parties, and as regards the sum of £1,558 they have an equitable defence, to which the court must, since the fusion of law and equity, give effect.

Further, there might be competing decisions by different courts in respect of the same debt. Where there are two part owners of the same debt one cannot sue for recovery of his part without joining the other: *In re Steel Wing Co. Ld.*[4] The defendants cannot safely pay into court in this action since the plaintiffs would have the right to take the money out, and the defendants would still be liable to Hall & Co. The action can only be allowed to proceed if Hall & Co. come in as plaintiffs and sue for £1,558, or if the plaintiffs join Hall & Co. as defendants and amend their claim by confining it to the excess over the sum assigned.

As to the argument that if the plaintiffs recover judgment the debt is merged in the judgment, a judgment only operates inter partes: *Isaacs & Sons* v. *Salbstein.*[5] *Hughes* v. *Pump House Hotel Co. Ld.*[6] was a decision that the assignment was absolute and that the assignee could sue in his own name without joining the assignor. If it implied that an equitable assignee could not sue even if he joined the assignor ,then it was inconsistent with the decision in *Brandt's* case,[7] where an equitable assignee recovered judgment.

On the cross-appeal, the official referee had been informed before he made his order that the plaintiffs intended to appeal and had, partly on that account, made an order only staying the action pending the joinder of Hall & Co. or further order. If the plaintiffs persist in refusing to amend the proceedings in one of the ways indicated, or by obtaining and alleging a re-assignment, the action should be dismissed: *Performing Rights Society* v. *London Theatre of Varieties.*[8]

John Perrett in reply. *Brandt's* case[9] is distinguishable because there the legal owner had been paid and he was equitably estopped .from suing because he had given a discharge. He had taken the money fraudulently. The defendants raised no objection to his absence from the proceedings. Lord Sumner in *Performing Rights Society* v. *London Theatre of Varieties*[10] explained that *Brandt's* case[9] was an exception to the rule that the equitable assignee may sue alone for the debt. In the *Performing Rights Society* case [10] it was held that the interests of the plaintiffs in the subject-matter of that action being equitable only they were not entitled to the relief sought. That action failed because it was brought by the equitable and not the legal owner of the subject-matter. The defendants here contend that an action brought by a legal owner must likewise fail for lack of the equitable owner, which is against all authority.

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[3] [1905] A.C. 454.
[4] [1921] 1 Ch. 349.
[5] [1916] 2 K.B. 139.
[6] [1902] 2 K.B. 190.
[7] [1905] A.C. 454.
[8] [1924] A.C. 1.
[9] [1905] A.C. 454.
[10] [1924] A.C. 1.

Cur. adv. vult.

March 16. HODSON L.J. The judgment of the court will be given by Parker L.J.

PARKER L.J. read the following judgment: The plaintiffs, who are plaster-work contractors, in 1952 carried out certain work as sub-contractors of the defendants, who are builders. Disputes arose as to the amount due from the defendants, and in July, 1953, the present proceedings were brought by the plaintiffs alleging that the defendants were indebted to them in the sum of £1,808. Meanwhile, the plaintiffs had become indebted to their suppliers, Hall & Co. Ld., in the sum of £1,558, and desired to get further materials from them for current work. Accordingly, an arrangement was made whereby the plaintiffs were to give the defendants an irrevocable authority to pay Hall & Co. Ld. £1,558 out of the £1,808 alleged to be due from the defendants, and Hall & Co. Ld. were to continue to supply material to the plaintiffs. The arrangement was carried through by means of two documents dated September 1, 1953.

The first document, signed by Hall & Co. Ld., was as follows: "In consideration of your today giving an irrevocable authority "to J. Murphy & Sons Ld. of 43, Charteris Road, Finsbury Park, "N. 4, to pay to us the sum of £1,558 17s. 8d. (one thousand "five hundred and fifty-eight pounds, seventeen shillings and "eightpence) from moneys owing by them to you, as therein "more particularly mentioned we hereby undertake with you that "we will forthwith pay over to you any moneys which are paid "to us by J. Murphy & Sons Ld. pursuant to such irrevocable "authority after your debt to us of £1,558 17s. 8d. or such part "thereof as may from time to time be owing, has been fully "repaid either by you or out of the moneys which we receive from "time to time from the said J. Murphy & Sons Ld. or their "assigns."

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[10] [1924] A.C. 1.

The second, addressed by the plaintiffs to the defendants, was in this form: "We hereby authorize and request you to pay to "Hall & Co. Ld. of Victoria Wharf, Croydon, Surrey, the sum "of £1,558 17s. 8d. from moneys owing by you to us in respect "of work done on your behalf under the above mentioned contract. The receipt of Hall & Co. Ld. shall be a good and "sufficient discharge to you in respect of the payment made "hereunder. This authority is given for valuable consideration to "secure payment of a debt and is irrevocable by us unless Hall "& Co. Ld. shall consent in writing to the revocation thereof."

On October 21, 1953, the defendants delivered their defence and pleaded, inter alia, that this arrangement of which they had notice amounted to an assignment of £1,558, part of the alleged debt, and that both as regards the £1,558 and any excess no claim lay without the joinder of Hall & Co. Ld. The matter was tried as a preliminary issue by the official referee, who upheld the defendants' plea and stayed the proceedings. Against this order the plaintiffs now appeal.

It is, we think, clear that the arrangement between the plaintiffs and Hall & Co. Ld. amounted to an equitable assignment by way of charge of part of the debt alleged to be due from the defendants. It was in a form similar to the documents in question in *In re Kent & Sussex Sawmills Ld.*,[1] and, no doubt, as a result of that decision the charge was duly registered under section 95 of the Companies Act, 1948. Normally, of course, it is the assignee who, if necessary, seeks to recover the debt, and in a case where, as here, section 136 of the Law of Property Act, 1925, does not apply, he would have to join the assignor in order to bind him at law.

In the present case, however, it is the assignor who is seeking to recover, and in his own right, and it is strongly urged that he is entitled to do so without joining the assignee. We think that that is an impossible contention. The whole object of the notice to the debtor is to protect the assignee. After receipt of that notice the debtor pays the assignor at his peril. Reliance was, however, placed on certain words of Mathew L.J. in *Hughes* v. *Pump House Hotel Co. Ld.*[2] In that case the plaintiff, Hughes, a builder, had assigned to his bankers all moneys due from the defendants, the building owners. The question was whether the assignment was an absolute assignment within section 25 (6) of the Judicature Act, 1873, in which case the action should have been in the assignee's name, or whether it was an assignment by way of charge only, in which case, as Mathew L.J. said, "the "action must be in the name of the assignor." In our opinion, however, he was not saying that the assignor, the plaintiff, was entitled to sue for his own benefit. The question was merely whether the action should have been brought by the assignee in his own name or by the assignee in the name of the assignor.

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[1] [1947] Ch. 177; 62 T.L.R. 747; [1946] 2 All E.R. 638.

[2] [1902] 2 K.B. 190; 18 T.L.R. 654.

It was further said that once the plaintiffs in the present proceedings recovered judgment the debt would merge in the judgment debt, and that, accordingly, the defendants could not thereafter be sued by Hall & Co. Ld. The court, however, will not give judgment for the plaintiffs when there is an admitted interest outstanding in Hall & Co. Ld., and unless and until the authority to pay Hall & Co. Ld. is withdrawn, or Hall & Co. Ld. are joined in the proceedings, judgment cannot be given.

Further, in the present case the assignment is only of part of a debt, and that being so, the plaintiff cannot recover even the excess, if any, over the part assigned without bringing Hall & Co. Ld. before the court: *In re Steel Wing Co. Ld.*[3] We are of opinion, therefore, that the appeal should be dismissed.

It remains only to consider the defendants' cross-appeal, which is an appeal from the official referee's order merely staying the proceedings. In our opinion, the defendants are entitled to an order dismissing the claim, unless within a fixed period the claim is put in proper form. This could take the form of the plaintiffs joining Hall & Co. Ld. as plaintiffs, should they be willing to do so, or as defendants, should they not be willing. Alternatively, the plaintiffs might be able to induce Hall & Co. Ld. to consent to the authority to pay being withdrawn, substituting some letter of trust under which the plaintiffs undertook to hold any sum recovered in the proceedings in trust for Hall & Co. Ld.

Appeal dismissed; cross-appeal allowed.

Solicitors: *Hicks, Arnold & Co.; Masons.*

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[3] [1921] 1 Ch. 349.

C. C. A.

1955
June 20;
July 4.

Lord Goddard C.J.,
Devlin and
Donovan JJ.

REGINA *v.* DENT.

Criminal Law—False pretences—Statement of intention about future conduct—Contract to destroy pests.

The appellant, who carried on the business of a pest destructor, entered into contracts with a number of farmers, to destroy vermin on their land over a period of a year. He asked for and received payment in advance of half the annual charge. In fact he did no work under the contracts. He was convicted under section 32 of the Larceny Act, 1916, on counts of obtaining money by falsely pretending that he was bona fide entering into contracts for the destruction of pests, and that he bona fide intended to perform them, and that he was and would be able and willing to do so. It was not suggested at the trial that he had not the means to do the work had he wanted to:—

Held, that a promise as to future conduct not intended to be kept was not by itself a false pretence in criminal law, and that accordingly the conviction must be quashed.

Aliter, had he not been carrying on a bona fide business and falsely pretended that he was, or had he not had the means to do the work and falsely pretended that he had.

Reg. v. *Jones* (1853) 6 Cox C.C. 467 and dictum in *Rex* v. *Jones* (1948) 33 Cr.App.R. 11 disapproved.

Appeal against conviction.

John Harrison Dent was charged with obtaining cheques by false pretences contrary to section 32 of the Larceny Act, 1916, on an indictment containing nine counts. The first count charged the appellant and his father with conspiracy. The next eight counts charged the appellant with false pretences, the particulars of which were similar in all counts, namely: "By falsely pretend-"ing that he, on behalf of C. Dent & Sons, was then bona fide "entering into a contract for the destruction of moles on land "in the occupation of . . . for a period of 12 months, and that "he and the said C. Dent & Sons then bona fide intended to "carry out their obligations under the said contract, and that he "and the said C. Dent & Sons then bona fide believed that they "were and would be able and willing to carry out their said "obligations."

The jury acquitted the appellant on the first and third counts and found him guilty on the remaining seven counts.

He appealed against conviction.

G. D. Lane for the appellant. In a charge of obtaining money by false pretences under section 32 of the Larceny Act, 1916, the false pretence alleged must relate to the past or present. The authorities nearly all seem to indicate that a mere intention as to future conduct, however it is framed, is not sufficient to found a charge of false pretences. The appellant and his father were originally indicted on the ground that they falsely represented themselves to be in a position to carry out the work. It became apparent at the committal proceedings that they were in a bona fide business at the time.

The first statute making false pretences an offence appears to be 30 Geo. 2, c. 24, s. 1, which was interpreted in *Rex* v. *Goodhall.*[1] [Reference was made to *Reg.* v. *Johnston*[2] and *Reg.* v. *Bates and Pugh.*[3]]

[LORD GODDARD C.J. Platt B., in *Reg.* v. *Bates and Pugh*,[4] states that the reason for the rule that a mere promise of future conduct is not sufficient to found a charge of false pretences is that otherwise every breach of contract might expose a man to an indictment.]

Reg. v. *Jones*[5] appears to be contrary to the appellant's submission. [Reference was also made to *Reg.* v. *Jennison*,[6] *Reg.* v. *Lee*,[7] *Reg.* v. *Giles*,[8] *Reg.* v. *Burrows*[9] and *Reg.* v. *Woodman.*[10]] *Edgington* v. *Fitzmaurice*,[11] a civil case, has never been cited in any reported criminal case, although it is referred to in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 723.

[LORD GODDARD C.J. Would you concede, that if the facts were that the appellant said, "If you will give me 10s. 6d. I will "here and now kill the rats on your land," and instead of doing that he went to a public house and spent the money, it would amount to false pretences?]

Yes. Ten years after *Reg.* v. *Gordon*[12] the Summary Jurisdiction Act, 1899, was passed. Section 3 of that Act, which was repealed by the Magistrates' Courts Act, 1952, required the justices to explain to the prisoner what was meant by a false pretence.

[LORD GODDARD C.J. No doubt that explanation in the Act of 1899 represents what has always been the law.]

[Reference was made to *Rex* v. *Bancroft.*[13]]

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[1] (1821) Russ. & Ry. 461.

[2] (1842) 2 Mood.C.C. 254.

[3] (1848) 3 Cox C.C. 201.

[4] Ibid. 204.

[5] (1853) 6 Cox C.C. 467.

[6] (1862) Leigh & Cave 157.

[7] (1863) Leigh & Cave 309.

[8] (1865) Leigh & Cave 502; 10 Cox C.C. 44.

[9] (1869) 11 Cox C.C. 258.

[10] (1879) 14 Cox C.C. 179.

[11] (1885) 29 Ch.D. 459; 1 T.L.R. 326.

[12] (1889) 23 Q.B.D. 354; 5 T.L.R. 466.

[13] (1909) 26 T.L.R. 10; 3 Cr.App.R. 16.

Mervyn Griffith-Jones for the Crown. While it is not disputed that the false pretence must be of a fact that is in existence, the conviction in this case can be supported on the basis of *Edgington* v. *Fitzmaurice*,[14] which, although it has never been referred to in a criminal case, is on all fours with the present case. It is essential, in order to sustain a charge of false pretences, that there should be an intention to defraud at the time of the obtaining when the representation was made. The difficulty and danger of pleading a future intention is that there is no guarantee that the jury, if they bring in a verdict of Guilty, will have found an intention to defraud at the time when the pretence was made. It is not simply a matter of grammatical twisting. If the accused had a guilty intention at the time, he is guilty of false pretences.

There is no distinction between *Gordon's* case[15] and the present case. The appellant went to a farmer, produced a written form of contract which the farmer signed, and he acted in every way as if he was entering into a bona fide contract.

[Lord Goddard C.J. But he did enter into a bona fide contract.]

The jury, by their verdict, found that it was not a bona fide contract.

[Lord Goddard C.J. We do not yet have a law which says that everything dishonest is criminal.]

If the argument for the appellant be correct, it means that any person, so long as he is carrying on some sort of business, can go round to innocent persons, pretend that he is going to carry out contracts, and take money from them without any intention of doing the work and yet be untouchable by the criminal law. The rule which requires that the facts relied on must represent an existing intention is not directed to what is said to the person defrauded, but what is pleaded in the indictment. The only object is that the jury should be able to find fraud at the time of the false pretence and not subsequently. There was evidence here that at the time when the appellant made the contracts he did not intend to carry out any of them.

[Lord Goddard C.J. The only case which might be in your favour is *Rex* v. *Bancroft*,[16] and I think that that can be distinguished. The authorities are quite clear that a promise to do something in the future is not enough.]

It is very difficult to distinguish between doing something in five minutes' time and doing it in a week. It really depends on what a man intends. There is no distinction in giving a worthless cheque dated today or dated tomorrow. If both cheques are given with an intention to defraud it would be remarkable that in one case a man would commit an offence and in the other he would not, simply because of the way it is worded in the indictment. The jury have to find that at the time the act was done it was done fraudulently, and there is then an offence. If a person says, "I intend to do something," the jury have to decide whether he had a false intention at the time he said it. If the pretence is stated as "I will do something," the jury might find that he had a bona fide intention when he said it, but that it subsequently became fraudulent. One has to indict a person in the form of the present or past in order that the jury may find that he was fraudulent at the time.

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[14] 29 Ch.D. 459.

[15] 23 Q.B.D. 354.

[16] 3 Cr.App.R. 16.

The fact that *Edgington* v. *Fitzmaurice*[17] has never been cited in criminal cases shows that this court independently came to the same conclusion as the Court of Appeal. That is shown by *Gordon's* case.[18] There is no difference between saying that there are funds in the bank to meet a worthless cheque and in saying, as in the present case, that there is a genuine contract.

[LORD GODDARD C.J. If you were right, everyone who committed a breach of contract would run the risk of being indicted.]

That risk is very remote, because in the ordinary case there would be no evidence of fraud at the commencement of the transaction. None of the authorities have gone so far as to say that the present intention of a future fact is not sufficient to found a charge of false pretences.

At the end of the argument the registrar of the Court of Criminal Appeal handed up to the Bench the report of a case.

LORD GODDARD C.J. The registrar reminds me of a judgment of mine in *Rex* v. *Jones*,[19] in which the facts were very similar to the present. The court quashed the conviction, and rightly so, but dicta[20] of mine, as to the case being one of larceny by a trick when comparing it to the case of a welching bookmaker, were clearly wrong, as I have felt ever since I saw the case reported. It was an unreserved judgment and counsel had not been instructed on either side. The appellant had only appealed against sentence, but we saw that the conviction was wrong and quashed it.

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[17] 29 Ch.D. 459.

[18] 23 Q.B.D. 354.

[19] (1948) 33 Cr.App.R. 11.

[20] Ibid. 12, 13.

The court quashed the conviction and discharged the appellant, but reserved its reasons.

Cur. adv. vult.

July 4. LORD GODDARD C.J. Devlin J. will deliver the judgment of the court.

DEVLIN J. On April 30, 1955, at the Lincolnshire (Parts of Lindsey) Quarter Sessions the appellant was convicted of a number of offences of obtaining cheques by false pretences and sentenced to 12 months' imprisonment. The deputy chairman, who presided over the court by which he was tried, certified that the case was fit for appeal to this court on the ground that it raised an important point of law, namely, whether the particulars of the offences as laid in counts 2, 4, 5, 6, 7, 8 and 9 of the indictment were sufficient false pretences within section 32 of the Larceny Act, 1916. The false pretence alleged in each of these counts is the same and is in the following terms:

"By falsely pretending that he, on behalf of C. Dent & Sons, "was then bona fide entering into a contract for the destruction "of moles on land in the occupation of Joseph Watson Lawson "for a period of 12 months, and that he and the said C. Dent & "Sons then bona fide intended to carry out their obligations under "the said contract, and that he and the said C. Dent & Sons "then bona fide believed that they were and would be able and "willing to carry out their said obligations."

As appears from these particulars the appellant had on behalf of himself and his father, who were together carrying on business as pest destructors, entered into contracts with a number of farmers to undertake the destruction of vermin on their land over the period of a year, and had asked for and obtained payment in advance of half the annual charge. In a number of cases besides those enumerated in the indictment they had done no work at all, and the jury, as shown by its verdict, was satisfied that in those cases they never had any intention of doing the work for which they took payment and had not entered into the contract in good faith and, in short, were doing business dishonestly. Dishonesty is not per se a criminal offence; and the point that has been argued before us and which is the subject of the deputy chairman's certificate is that a statement of intention, whether expressed or implied, is not a statement which can amount to a false pretence for the purposes of the criminal law. As the deputy chairman said, the authorities are not easy to reconcile, and in 1889 Wills J.[1] considered the point still to be doubtful.

The case for the prosecution is that when the appellant entered into each of the contracts in this case, he thereby impliedly represented that he intended to carry it out, whereas in fact he had no such intention. It is, of course, undisputed that to constitute a false pretence the false statement must be of an existing fact. The prosecution contend that a statement of present intention, although it relates to the future, is a statement of existing fact. That was the view expressed by Bowen L.J. in his celebrated dictum in *Edgington* v. *Fitzmaurice*[2]: "There "must be a misstatement of an existing fact: but the state of a "man's mind is as much a fact as the state of his digestion. "It is true that it is very difficult to prove what the state of a "man's mind at a particular time is, but if it can be ascertained "it is as much a fact as anything else. A misrepresentation as "to the state of a man's mind is, therefore, a misstatement of "fact."

Edgington v. *Fitzmaurice*[2] was an action for deceit. Whatever the position may be in civil cases, we are satisfied that a long course of authorities in criminal cases has laid it down that a statement of intention about future conduct, whether or not it be a statement of existing fact, is not such a statement as will amount to a false pretence in criminal law.

The first case cited to us on the point is that of *Rex* v. *Goodhall*.[3] In this case the prosecution alleged that the prisoner procured the delivery of goods to himself by falsely pretending that he would pay for them on delivery. The jury found the prisoner guilty and added that they found that at the time he applied for the goods and promised to send back the money he did not intend to return the money, but to obtain the goods and cheat the prosecutor. Garrow B. respited the judgment and the judges thereafter met and held the conviction wrong, being of opinion that it was not a pretence within the meaning of the statute 30 Geo. 2, c. 24, s. 1, but merely a promise for future conduct. We do not propose to go through all the other authorities which were cited to us to the same effect, for we are of opinion that the common law was accurately stated in section 3 of the Summary Jurisdiction Act, 1899, which gave directions to a court of summary jurisdiction about the manner in which it was to explain the charge of false pretences. The court was to say "that a false pretence means a false representation by words, "writing, or conduct that some fact exists or existed, and that "a promise as to future conduct not intended to be kept is not by "itself a false pretence . . ." We are unable for the purposes of this principle to distinguish between a promise and a statement of intention. Every promise by a person as to his future conduct implies a statement of intention about it, though not every statement of intention amounts to a promise. But it would manifestly be absurd to hold that when such a statement of intention does amount to a promise, the accused has committed no offence, and that when it does not amount to a promise, he has. No distinction can be drawn for this purpose between "I will do it" and "I intend to do it."

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[1] *Reg.* v. *Gordon* (1889) 23 Q.B.D. 354, 360; 5 T.L.R. 466.

[2] (1885) 29 Ch.D. 459, 483; 1 T.L.R. 326.

[3] (1821) Russ. & Ry. 461.

There are two qualifications to be noted. The first is that a promise as to future conduct may be coupled with a false statement of existing fact, and that the words in the statutory definition are "a promise . . . is not *by itself* a false pretence." This point is illustrated by several of the cases, for example, by *Reg.* v. *Jennison*,[4] where the prisoner obtained money from a woman by saying falsely that he was an unmarried man and that he intended to marry her. The court held that while the false promise to marry could not be the subject of an indictment, the false pretence that he was an unmarried man could be, and that the prisoner was properly convicted. In the type of case which this court is now considering, it is very often possible to allege and prove that the prisoner either expressly or by implication falsely pretended that he was carrying on a bona fide business. If this fact can be proved in addition to the false promise, the conviction can be sustained. The distinction is clearly illustrated in *Reg.* v. *Bates and Pugh*,[5] where the false pretence alleged was that the prisoner was then intending to open a shop, and that he was a provision dealer, and was possessed of a certain sum of money, £1 7s. 1½d., and so had the means of paying the price of the cheese which he sought to buy. Platt B. said[6]: "It was "objected, on behalf of the prisoner, that the pretences resolved "themselves into a mere intention to do a future act. If all the "pretences together were of that import, then the objection ought

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[4] (1862) Leigh & Cave 157.
[5] (1848) 3 Cox C.C. 201.
[6] Ibid. 203.

"to prevail. If the intention to open a shop related simply to "futurity, that would not do. But the pretence alleged that the "prisoner 'was then a provision dealer,' and that was a pretence "of an existing fact; so also was the pretence that the prisoner "had then the means of paying, and was ready and willing to "pay. In *Reg.* v. *Johnston*[7] the substance of the pretence was, "'If you will give me the money, I will apply it in a particular "'way,'—a mere promise, the breach of which was remediable "by a civil remedy. If that were a false pretence within the "statute, all breaches of contract would expose a man to an "indictment."

The words "ready and willing to pay" indicate the second qualification. Readiness and willingness to pay may suggest a statement about future conduct. It is clear from the authorities that the law does not seek to divide the future meticulously from the present. If a man says: "If you give me the goods now, I "will hand over £10," while as a matter of chronology payment follows after delivery, as a matter of business it is all one transaction. It has so far not been necessary to determine just where the dividing line between present and future is to be drawn. The reason for this is, we think, that there can in the nature of things be few promises intended to be performed immediately which do not import some statement about the promisor's readiness to perform, that is, that he has as an existing fact the power and the means to perform his promise. If a man promises to pay £10 forthwith, he must imply that he has the money to hand; if he promises to pay in a week, his promise is consistent with the mere hope that he will within that period obtain the means to honour it. These considerations explain, we think, two cases much relied on by the prosecution. In *Reg.* v. *Gordon*[8] (the case in which Wills J. expressed the doubt to which I have already referred) the prosecution alleged that the prisoner obtained a promissory note by falsely pretending that he was prepared to pay £100 in exchange for it. Lord Coleridge C.J.[9] said that it was objected "that we must "interpret the allegation that he was prepared to advance £100, "as if it meant that he was ready to do so at some future time, "and that it was a mere statement of his intention that at some "time afterwards he would deliver the £100. I do not think "that is the true interpretation of the pretence which is stated "to be false. . . . It appears to me that the ordinary meaning

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[7] (1842) 2 Mood.C.C. 254.

[8] 23 Q.B.D. 354.

[9] Ibid. 359.

"of the allegation is: 'I am *now* prepared to give you £100 if "'you will sign this paper. Here is £100, and when you "'sign that paper, which you will do in a moment, the £100 "'is yours.' That, apart from all question of existing state "of mind, seems to me to be a false pretence of an existing fact— "the existing fact stated being that the money was ready for "the prosecutors on their signing the paper."

This point about readiness depends, of course, on the circumstances of the case. It is not inevitably excluded by the fact that the promise is to do an act some time ahead, for the act may be one which makes it necessary to get ready some time before. The publication of a book, for example, requires preparation. Thus, in *Rex* v. *Bancroft*,[10] the prisoner, representing that he was about to publish a directory, started to canvass for advertisements, and in March and April obtained money in advance upon the statement that the book was to be published in May. At the time of this statement he had made no arrangements for publication. Lord Alverstone C.J. said [11]: " . . . it was for the jury to say "whether it was a statement made of an existing state of facts "that he intended to get it published in May, and that the thing "was in order for publication in May . . ." This dictum must be read as a whole and cannot be cited as an authority for the view that a mere statement of intention is enough; for the Lord Chief Justice had earlier in his judgment adopted as the governing principle the statement in Archbold (now set out in the 33rd ed., at p. 722) that "A promise to do a thing *in futuro* may involve "a false pretence that the promisor has the power to do that "thing . . ." Without the implication that "the thing was in "order for publication in May" the statement would not have amounted to a false pretence.

In the long series of authorities there is only one case in which a bare statement of intention was left to the jury as sufficient. In *Reg.* v. *Jones* [12] Coleridge J. left to the jury the question whether the accused intended to carry out his agreement, though he expressed himself as doubtful on the point. The prisoner was convicted, but, as he was also convicted on another count about which there could be no argument, the point was not further considered. In the view we take of the law this case can no longer be considered as authoritative.

We adhere to the view expressed in the old authorities. We need not determine whether it is a rule peculiar to the criminal law or how far, if at all, it extends to the civil law; nor need we determine the reason that lies behind it. In some of the earlier cases it is suggested that it is the credulity of the promisee that is really to blame. In the passage quoted from Platt B.'s judgment in *Reg.* v. *Bates and Pugh*,[13] the reason which attracted the baron is the danger that any breach of contract might expose a man to indictment. It would not be surprising if in criminal frauds the law was more careful of the interests of the accused than in civil. However this may be, we think that the rule is so well settled that it ought not now to be departed from.

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[10] (1909) 26 T.L.R. 10; 3 Cr.App. R. 16.

[11] 3 Cr.App.R. 16, 21.

[12] (1853) 6 Cox C.C. 467.

The case before this court was a simple case of a promise as to future conduct implied from the entry into a contract. It is not suggested that the appellant and his father were not carrying on a genuine business as pest destructors. It is significant that when they were charged before the magistrates the false pretence alleged was the pretence that they were carrying on a bona fide business. The evidence did not support the allegation that this representation was false and so it finds no place in the indictment. It was not suggested that the appellant had not the means to do the work if he wanted to. Nor is this a case in which there is any difficulty about drawing the line between the present and the future, or where there was any representation about immediate readiness to do the work; the appellant said that he would do the work in the course of the year, and what is put against him is simply that he did not mean to do it. It was this simple issue that the deputy chairman left clearly to the jury in accordance with the view that he took of the law; he told them that what the prosecution had to prove was that the appellant at the time of entering into the contracts had no genuine intention of carrying them out, and that he falsely pretended that he had. For the reasons we have given we do not think that this is a correct view of the law, and we have therefore quashed the conviction.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

C. J. E.

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[13] 3 Cox C.C. 201, 204.

C. C. A.

1955
July 18.

Lord Goddard C.J., Finnemore and Devlin JJ.

REGINA *v.* HEPWORTH AND FEARNLEY.

Criminal Law—Summing up—Directions to jury—Onus of proof—Jury to be sure of accused's guilt before convicting—Receiving.

Criminal Law—Receiving. Burden of proof.

Although no particular formula of words is required when directing a jury in a criminal case, the jury should be directed that the onus is always on the prosecution and that, before they convict, they must feel sure of the accused's guilt.

Dicta of Lord Goddard C.J. in *Rex* v. *Kritz* [1950] 1 K.B. 82, 89; 65 T.L.R. 505; [1949] 2 All E.R. 406 applied, and in *Reg.* v. *Summers* (1952) 36 Cr.App.R. 14, 15; [1952] 1 All E.R. 1059 explained.

In cases of receiving stolen property it is desirable that the jury should also be told that the possession of goods recently stolen calls for an explanation, and if none is given, or one is given which the jury are convinced is untrue, that entitles them to convict. But if the explanation given leaves them in doubt whether the accused received the goods honestly or dishonestly, the prosecution have not proved the case and they should acquit.

Rex v. *Schama and Abramovitch* (1914) 11 Cr.App.R. 45; 31 T.L.R. 88 explained.

Appeal against conviction.

The appellants, George Alfred Hepworth and Norman Fearnley, were charged at Bradford City Sessions on six counts. The first count charged Fearnley that on a day in or about November, 1954, he stole four bales of wool, the property of John Feather & Son Ld.; the second count charged him with receiving the bales knowing them to have been stolen. The third count charged Hepworth with receiving the four bales. The fourth and fifth counts charged Fearnley with stealing or, alternatively, with receiving a further four bales in December, 1954; and the sixth count charged Hepworth with receiving them. Both accused were convicted of receiving the wool, Hepworth being sentenced to two years' and Fearnley to 18 months' imprisonment.

The grounds of the appeal were that the recorder in his summing up failed to direct the jury adequately as to the burden of proof or the way in which the jury should regard the appellants' explanations of their possession of the stolen goods.

During the course of his summing up, the recorder said: "If "you are not satisfied that [Fearnley] stole the bales, you "should then consider whether or not you think he received "them knowing them to have been stolen. . . . If you are not "satisfied that Fearnley is guilty on the fourth count of stealing "those four bales, you must consider whether or not you think "he is guilty, or [are] satisfied that he was guilty, of receiving "them, knowing them to have been stolen. . . . In any case of "receiving goods knowing them to have been stolen, there are "three matters about which you have to be satisfied before you "can convict an accused man: first, that the article—in this "case wool—had been stolen; secondly, that it had been received "by the individual—Fearnley in this case; and if you are satisfied "that he received the wool, you must be satisfied in order to "convict him that, at the time he received the wool he knew "that it had been stolen. . . . Now, those points of law which "I have dealt with relating to a charge of receiving goods, well "knowing them to have been stolen, apply equally in the case "of Hepworth."

Rudolph Lyons Q.C. and *Edward Lyons* for Hepworth. During the whole of the summing-up the word "doubt" was never used. The jury were only asked if they were "satisfied" or if they "thought" that the accused was Guilty. Again, the word "explanation" was never used, nor was there any reference as to where the burden of proof lay. In *Woolmington* v. *Director of Public Prosecutions*[1] it was made clear that the burden of proof was on the prosecution throughout the trial. That it is always necessary for the judge to direct the jury as to the burden of proof is shown in *Lawrence* v. *The King*.[2] In *Rex* v. *Kritz*[3] it was pointed out that although no particular formula of words was required the jury should be made to understand that they must not return a verdict against a defendant unless they felt sure, and that the onus was all the time on the prosecution. *Reg.* v. *Summers*[4] extended the word "satisfied" and indicated that the jury should be told to regard the evidence and "see that "it satisfies them so that they can feel sure." The recorder should have directed the jury as to the explanation given by Hepworth for his possession of the wool in the terms laid down in *Rex* v. *Aves*.[5] [*Rex* v. *Garth*[6] was also referred to.]

Edward Lyons, for Fearnley, adopted the argument presented on behalf of Hepworth.

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[1] [1935] A.C. 462; 51 T.L.R. 446.

[2] [1933] A.C. 699, 707; 50 T.L.R. 13.

[3] [1950] 1 K.B. 82, 89; 65 T.L.R. 505; [1949] 2 All E.R. 406.

[4] (1952) 36 Cr.App.R. 14; [1952] 1 All E.R. 1059.

[5] (1950) 34 Cr.App.R. 159, 160; [1950] 2 All E.R. 330.

[6] [1949] W.N. 170; 33 Cr.App.R. 100; [1949] 1 All E.R. 773.

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J. S. Snowden for the Crown. It is conceded that the summing-up could have been better expressed, but it is submitted that the plain meaning of "satisfied" is "sure" and that the summing-up was sufficiently clear for the jury to come to a just conclusion.

LORD GODDARD C.J. The appellants were convicted before the recorder of Bradford of the offence of receiving wool, an offence which is by no means uncommon in Yorkshire. I have no doubt that for the most part, at any rate, juries drawn from the citizens of Bradford know perfectly well what their duty is in trying offences of that description. They have to find and feel sure that the goods have been stolen, that they have got into the possession of the accused persons and that the accused knew that they were stolen.

Having read the evidence in this case one is not surprised that the jury found these men Guilty, but complaint is made in the case—and the jury were certainly out a very long time before they arrived at their verdict—that the recorder in summing up did not give the jury any direction with regard to the burden of proof, and did not give them a sufficient direction with regard to the duty of a jury and how they were to regard the evidence and the degree of certainty they were to feel.

First, with regard to the burden of proof, it is always desirable that a jury should be told that the burden of proof is on the prosecution. I have no doubt that, in most cases, they know it, but it is desirable that they should be told that it is for the prosecution to prove the case. It is also most desirable that emphasis should be laid upon that in a receiving case. In such a case it is generally desirable, although there may be circumstances in the particular case which would not render it necessary, to remind the jury first, that the burden of proof remains on the prosecution; secondly, to tell them that if an explanation for possession of the goods is given by the accused, although the jury may not be convinced that it is true, if they think that it may be true it would mean that the prosecution have not proved the case because the jury would remain in some degree of doubt. It is not necessary to use on all occasions the formula which was used in *Rex* v. *Schama and Abramovitch*[1] because that case, which is constantly cited in these matters relating to receiving, as I have said more than once in giving judgment in appeals, lays down no more than this: if the explanation given by the accused persons which, when they have given it becomes part of the sum of evidence in the case, leaves the jury in doubt whether the accused honestly or dishonestly received the goods, they are entitled to be acquitted because the case has not been proved. A case is never proved if any jury is left in any degree of doubt.

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[1] (1914) 11 Cr.App.R. 45; 31 T.L.R. 88.

Another thing that is said in the present case is that the recorder only used the word "satisfied." It may be, especially considering the number of cases recently in which this question has arisen, that I misled courts because I said in *Reg.* v. *Summers* [2] —and I still adhere to it—that I thought that it was very unfortunate to talk to juries about "reasonable doubt" because the explanations given as to what is and what is not a reasonable doubt are so very often extraordinarily difficult to follow and it is very difficult to tell a jury what is a reasonable doubt. To tell a jury that it must not be a fanciful doubt is something that is without any real guidance. To tell them that a reasonable doubt is such a doubt as to cause them to hesitate in their own affairs never seems to me to convey any particular standard; one member of the jury might say he would hesitate over something and another member might say that that would not cause him to hesitate at all. I therefore suggested that it would be better to use some other expression, by which I meant to convey to the jury that they should only convict if they felt sure of the guilt of the accused. It may be that in some cases the word "satisfied" is enough. Then, it is said that the jury in a civil case has to be satisfied and, therefore, one is only laying down the same standard of proof as in a civil case. I confess that I have had some difficulty in understanding how there is or there can be two standards; therefore, one would be on safe ground if one said in a criminal case to a jury: "You must be satisfied beyond reasonable doubt" and one could also say: "You, the jury, must be completely satisfied," or better still: "You must feel sure of the prisoner's "guilt." But I desire to repeat what I said in *Rex* v. *Kritz* [3]: "It is not the particular formula that matters: it is the "effect of the summing-up. If the jury are made to under- "stand that they have to be satisfied and must not return a "verdict against a defendant unless they feel sure, and that the "onus is all the time on the prosecution and not on the defence," that is enough. I should be very sorry if it were thought that these cases should depend on the use of a particular formula or particular word or words. The point is that the jury should be directed first, that the onus is always on the prosecution; secondly, that before they convict they must feel sure of the accused's guilt. If that is done, that will be enough.

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[2] (1952) 36 Cr.App.R. 14, 15; [1952] 1 All E.R. 1059.

[3] [1950] 1 K.B. 82, 89; 65 T.L.R. 505; [1949] 2 All E.R. 406.

Comment has been made on the use by the recorder of the word "satisfied" only, and we have come to the conclusion that the summing-up was not satisfactory; but again I emphasize that this is a case of receiving and in such a case it is always important that the onus of proof should be emphasized and explained. The jury should be told that the possession of goods recently stolen calls for an explanation, and if none is given, or one is given which the jury are convinced is untrue, that entitles them to convict. But if the explanation given leaves them in doubt as to whether the accused received the goods honestly or dishonestly the prosecution have not proved the case and they should acquit.

For the reasons I have endeavoured to give—I hope it will not be thought that we are laying down any particular form of words, but we are saying it is desirable that something more should be said than merely "satisfied"—we think that the conviction should be quashed.

Appeal allowed.

Solicitors: *Sidney Torrance & Co., for Jack Levi, Leeds; W. H. Leathem, Bradford.*

J. D. P.

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July 5, 6.
Evershed M.R., Jenkins and Parker L.JJ.

DIPLOMA LAUNDRY LD. *v.* SURREY TIMBER CO. LD.

[Plaint No. L. 23.]

Landlord and Tenant—Act of 1954—*Business premises—Tenants' request for a new tenancy—Landlords' notice of opposition—Occupation for purposes of landlords' business—"Interest of land-"lord" by purchase or creation—"Landlord" at time when request made—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *ss.* 30 (1) (*g*), (2), 44.

By section 30 (2) of the Landlord and Tenant Act, 1954, a landlord shall not be entitled to oppose the application of a tenant for a new tenancy on the ground that he requires the premises for his own occupation "if the interest of the landlord, or an interest "which has merged in that interest and but for the merger would "be the interest of the landlord, was purchased or created after "the beginning of the period of five years which ends with the "termination of the current tenancy. . . ."

In 1949 S. Co. purchased the freehold reversion of business premises then let to F. Co. for a term due to expire on March 25, 1955, and sublet to D. Ld. for the whole term less one day. In 1953 the head lease of F. Co. was surrendered for valuable consideration and in 1954 D. Ld. applied for a new tenancy under the Landlord and Tenant Act, 1954, to commence on the expiry of the current tenancy. S. Co. opposed the application on the ground that they required the premises for the purposes of their own business:—

Held, that in considering, for the purposes of section 30 (2) of the Act of 1954, whether the "interest of the landlord" had been purchased or created within five years immediately before the termination of the current tenancy, the relevant time for determining which interest was the interest of the "landlord" as defined in section 44 was the date when the tenant made his request for a new tenancy; that, at that date, the interest of F. Co., had there been no merger, would not have been the interest of a "landlord" as defined in section 44 (1) (*b*), because it was then due to expire in less than 14 months, and it would therefore have been irrelevant for the purpose of section 30 (2); that the interest of S. Co., on the other hand, was the interest of a "landlord" as defined; and that, since it had not been purchased or created within five years of the date on which the current tenancy terminated, S. Co. were not disabled by section 30 (2) from relying on the ground of objection which they had put forward.

APPEAL from Judge Daynes sitting at Southwark County Court.

On September 26, 1934, the Metal Box Co. Ld., the lessees of premises comprising land and buildings adjoining Nos. 185–195, Grove Street, Deptford, London, granted a sublease to Fleetwing Oil Co. Ld. expiring March 25, 1955, and on July 15, 1935, the Fleetwing Oil Co. Ld. granted to Diploma Laundry Ld. a sub-sublease for the term of 21 years less one day from March 25, 1934, expiring March 24, 1955.

The head lease of Metal Box Co. Ld. was surrendered on April 2, 1948. In 1949, the Surrey Timber Co. Ld. acquired the freehold reversion. On March 25, 1953, the Fleetwing Oil Co. Ld. surrendered their interest for valuable consideration, and thereafter the Diploma Laundry Ld. paid rent direct to the Surrey Timber Co. Ld. (hereinafter called the "freeholders"). On September 23, 1954, Diploma Laundry Ld. requested the freeholders to grant to them a new tenancy for the term of seven years from

March 24, 1955, the request being expressed to be made under section 26 of the Landlord and Tenant Act, 1954.[1] On October 19, 1954, the freeholders gave notice that they would oppose any application to the court for the grant of a new tenancy on the ground that on the termination of the current tenancy they intended to occupy the premises for the purposes of their own business in conjunction with their adjoining premises. The tenants applied to the county court submitting that sections 30 (2) and 44 of the Act of 1954 [2] disabled the freeholders from relying on the ground of objection stated by them in opposition to the tenants' request. The county court judge rejected that submission and dismissed the application.

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[1] Landlord and Tenant Act, 1954, s. 26: "(1) A tenant's request for a "new tenancy may be made where "the tenancy under which he holds ". . . is a tenancy granted for a "term of years certain exceeding one "year . . . (3) A tenant's request "for a new tenancy shall not have "effect unless it is made by notice in "the prescribed form given to the "landlord and sets out the tenant's "proposals. . . . (6) Within two "months of the making of a tenant's "request for a new tenancy the land-"lord may give notice to the tenant "that he will oppose an application "to the court for the grant of a new "tenancy, and any such notice shall "state on which of the grounds men-"tioned in section 30 of this Act the "landlord will oppose the applica-"tion."

[2] S. 30: "(1) The grounds on "which a landlord may oppose an "application under section 24 (1) of "this Act are such of the following "grounds as may be stated in the "landlord's notice under section 25 "of this Act or, as the case may be, "under section 26 (6) thereof, that is "to say . . . (*g*) subject as herein-"after provided, that on the termina-"tion of the current tenancy the land-"lord intends to occupy the holding "for the purposes, or partly for the "purposes, of a business to be carried "on by him therein, or as his resi-"dence. (2) The landlord shall not "be entitled to oppose an application "on the ground specified in para-"graph (*g*) of the last foregoing sub-"section if the interest of the land-"lord, or an interest which has merged "in that interest and but for the "merger would be the interest of the "landlord, was purchased or created "after the beginning of the period "of five years which ends with the "termination of the current tenancy, "and at all times since the purchase "or creation thereof the holding has "been comprised in a tenancy or suc-"cessive tenancies of the description "specified in subsection (1) of sec-"tion 23 of this Act."

S. 44: "(1) Subject to the next "following subsection, in this Part "of this Act the expression 'the "'landlord', in relation to a tenancy "(in this section referred to as 'the "'relevant tenancy'), means the "person (whether or not he is the "immediate landlord) who is the "owner of that interest in the pro-"perty comprised in the relevant "tenancy which for the time being "fulfils the following conditions, that "is to say—(*a*) that it is an interest "in reversion expectant (whether im-"mediately or not) on the termina-"tion of the relevant tenancy, and "(*b*) that it is either the fee simple "or a tenancy which will not come "to an end within 14 months or less "by effluxion of time or by virtue of "a notice to quit already given by "the landlord, and is not itself in "reversion expectant (whether im-"mediately or not) on an interest "which fulfils those conditions."

The tenants appealed. It was not disputed that so far as the freehold interest was concerned it had been acquired more than five years before the date on which the current tenancy terminated, but the question arose in connexion with the interest of the Fleetwing Oil Co. Ld.

Alan Campbell for the tenants, Diploma Laundry Ld. The object of section 30 (2) of the Landlord and Tenant Act, 1954, is to prevent landlords who have bought themselves into the saddle at the tail end of a lease from being in the position to oppose the tenant's application for the grant of a new lease. In the present case the freeholders obtained their interest as "landlords," as defined in section 44, within the period referred to in section 30 (2), and they are not entitled to oppose the present application. The interest of the freeholders was "purchased" within the meaning of section 30 (2), for it arose on the surrender for value of the Fleetwing Oil Ld.'s interest in 1953. For the purpose of section 30 (2), it was "created" then, because it became for the first time the interest of a "landlord" as defined in section 44. Before the surrender, the freeholders' interest was expectant on the interest of the Fleetwing Oil Co. Ld., which had then more than 14 months to run and, therefore, satisfied section 44 (1) (*a*) and (*b*), thus excluding the freeholders from being "landlords" as defined. By the act of surrender, the freeholders became "landlords" satisfying section 44 (1) (*a*) and (*b*), and this change was due to a "purchase" or "creation" within the period mentioned in section 30 (2).

The surrender accelerated the automatic statutory process which would have taken place under the Sixth Schedule (for if there had been no surrender, section 44 (3) and, therefore, the Sixth Schedule would have applied). That acceleration was a "creation" for the purposes of section 30 (2).

[EVERSHED M.R. In September, 1954, the interest of the Fleetwing Oil Co. Ld. would have come to an end within 14 months and, therefore, it is not a relevant interest for the purposes of section 30 (2).]

The relevant date for applying section 30 (2) is not the date of the application (September, 1954), but the date of the merger, (1953). Section 30 (2) refers to the statutory interest of the "landlord," not to the common law interest of a landlord. Section 30 (2) applies if the landlord seeking to oppose the grant of the new tenancy became, within the relevant period, entitled to an interest of the type which would enable him to put in a notice of opposition to an application for a new tenancy.

Nigel Bridge, for the freeholders, was not called upon to argue.

Evershed M.R. In *X.L. Fisheries Ld.* v. *Leeds Corporation*,[1] this court two days ago had to consider the construction of section 57 of the Landlord and Tenant Act, 1954. In the present case a question of construction concerned primarily with sections 30 and 44 of the same Act has arisen. As I said in the earlier case, the language of Parliament in this Act, I must confess, appears highly complex; but the subject-matter is notoriously difficult, and I do not, of course, at all know what were the particular problems which faced the draftsman.

In the present case, as in *X.L. Fisheries Ld.* v. *Leeds Corporation*,[1] the tenants of a relevant tenancy within Part II of the Act had made a request for the grant of a new tenancy. In the present case the request was made on September 23, 1954. It is provided by section 26 (6) in Part II of the Act, that within two months of the making of the tenant's request the landlord may give notice to the tenant that he will oppose the tenant's application; and it is required that a landlord who gives such a notice shall in the notice state on which of the grounds mentioned in section 30 he proposes to rely. In this case the landlords gave notice of their intending opposition in October, 1954, and in compliance with the provision to which I have just referred, stated that they proposed to rely upon the ground set forth in paragraph (*g*) of section 30 (1). [His Lordship read paragraph (*g*) and continued:] It is not in doubt that the landlords, the Surrey Timber Co. Ld., who put in that notice of opposition, do intend so to occupy the holding.

The initial four words of the paragraph (*g*)—"subject as "hereinafter provided"—anticipate the provisions of section 30 (2), and they are the provisions which, in conjunction with section 44, we are now called upon to construe. [His Lordship read section 30 (2) and continued:] The question which is here posed for our determination is whether the interest of the landlords, within that subsection, or an interest which has merged in that interest and but for the merger would be the interest of the landlords, was purchased or created within the period stated.

[Having stated the facts his Lordship continued:] It was agreed that the five years' period indicated in section 30 (2), for the purposes of the present case, began on March 24, 1950. The question, therefore, is whether the interest of the landlords has been purchased or created since that date.

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[1] Post, p. 636.

So far as that interest is a freehold interest, what I have already said plainly answers negatively that question. But I must return to the interest of the Fleetwing Oil Co. Ld., which would have continued in the ordinary course until March 25, 1955. In March, 1953, an arrangement was made between the Surrey Timber Co. Ld. and the Fleetwing Oil Co. Ld., to which the Diploma Laundry Ld. adhered, for the surrender of the unexpired remainder of the Fleetwing Oil Co. Ld.'s lease to the freeholders, the Surrey Timber Co. Ld. If, as I will assume, the effect was to merge the Fleetwing Oil Co. Ld.'s lease in the freehold, then the practical result was that after March, 1953, the Surrey Timber Co. Ld., as freeholders, held the interest immediately expectant on Diploma Laundry Ld.'s tenancy. That was the state of affairs when the request for a new lease was sent to the Surrey Timber Co. Ld. by Diploma Laundry Ld. in September, 1954.

I will now return to the language of section 30 (2), and I will read again the relevant words: "The landlord shall not be entitled "to oppose an application on the ground specified in paragraph (*g*) "of the last foregoing subsection if the interest of the landlord, or "an interest which has merged in that interest and but for the "merger would be the interest of the landlord, was purchased or "created after the beginning of the period of five years which "ends with the termination of the current tenancy"—that is to say, after March 24, 1950. What is meant by "the interest of "the landlord"? I shall have presently to refer to section 44, which defines the word "landlord," but I confess that I have no doubt as a matter of construction of this subsection that the words "the interest of the landlord" mean the relevant interest of the landlord for the purpose in hand, namely, that of considering whether the landlord is or is not on a particular date entitled to oppose, on the ground of paragraph (*g*) of subsection (1), the tenant's request. The court is, therefore, required to consider what was the interest of the Surrey Timber Co. Ld. when the request was made, or when the opposition was put in—and for the present purposes it matters not which is the more correct date. That such is the sense of the words, seems to me to follow from the language which I have also read—"or an interest "which *has* merged in that interest and but for the merger

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"*would be* the interest of the landlord." Those are words which, as it seems to me, point inevitably to the date when the landlord is saying: "I wish to oppose this application."

If I am right, I think there is at once to be discerned the answer to the present appeal. I have already said that, so far as the freehold is concerned, which was the interest in fact of the landlords at the relevant date, it had been acquired in the year 1949; but then come the words "or an interest which has "merged in that interest and but for the merger would be the "interest of the landlord." Apart from the definition section, the narrative which I have given would lead, I think, clearly to the conclusion that those words would be apt to cover the merged interest of the Fleetwing Oil Co. Ld.; because, had it not been for the merger, that interest would be the interest of the landlord, meaning thereby the landlord of the Diploma Laundry Ld. If that had been the right conclusion, the court would then have had to consider whether that leasehold interest had been purchased or created after March, 1950.

The county court judge came to the conclusion that a surrender for valuable but not monetary consideration was not a "purchase" within the meaning of the section, and he concluded also that there had been no "creation" of that or any relevant interest within the meaning of the subsection.

On the view I take, it is unnecessary for me to express my view on those matters, and I do not do so. The question which, I think, must be answered adversely to Mr. Campbell and is fatal to his appeal is: what is the effect, on the language I have read and emphasized in section 30 (2), of section 44 and the definition there to be found of the word "landlord"? [His Lordship read section 44 (1).] The extraordinary elaboration of that definition is, at first sight, surprising. It inevitably contemplates that there may, in relation to any relevant tenancy, be more than one landlord. But that is, no doubt, in order to secure that a tenant is not to be deprived of his claim to a new tenancy, or limited in the effect to be given to his application, by the circumstance that the interest immediately expectant on his existing interest is one which has but a very short time to run. In other words, the Act, as I understand it, contemplates the grant of a new tenancy which will bind not only the immediate and limited reversion, but a more remote interest as well; and so in this definition the words "whether immediately or not" are used. At the same time it is made clear that for the purposes of this section—and, therefore, for the purposes of Part II—certain reversionary interests which have but very little time to run are excluded from relevant consideration.

I have said that the requirement of section 30 (2) is that one has to consider at the date of the application who are the landlords or the possible qualifiers as landlords, and what their interests then are. If I go back to section 44, the freehold interest of the Surrey Timber Co. Ld. was plainly the interest of a landlord within the meaning of that section, since it fulfilled the condition, first, that it was an interest in reversion expectant—in fact, immediately—on the termination of the relevant tenancy, second, that it was a fee simple, and, third, that it was not itself a reversion expectant on an interest which fulfilled both the first two conditions I have mentioned. The language makes it clear, in my judgment, that the Surrey Timber Co. Ld. are in a situation to say: "We are the landlords within "the meaning of section 30 (2), being immediate reversioners, "and our interest is that of freeholders, which we acquired in "1949." But then I have to consider the words which I have already read—"or an interest which has merged in that interest "and but for the merger would be the interest of the landlord." I must, therefore, ask the question: But for the merger, would the interest of the Fleetwing Oil Co. Ld. be the interest of "the landlord" (as defined by section 44), or would it have been the interest of the landlord on the date of the application? The answer, in my judgment, is that it would not. It is true that it was or would have been an interest in reversion expectant on the termination of the relevant tenancy within the terms of paragraph (*a*) of section 44 (1); but it would not have satisfied condition (*b*) because it was not a fee simple, nor was it a tenancy which would not have come to an end within 14 months or less by effluxion of time. The reason is that, as I have already said, the interest of the Fleetwing Oil Co. Ld. would have come to an end by the effluxion of time in March, 1955, five or six months after the date which we are considering, of the tenants' application or the landlords' opposition. Therefore it seems to me that it necessarily follows that in the autumn of 1954 the leasehold interest of the Fleetwing Oil Co. Ld., merged or not merged, would have been an irrelevant interest for the purposes of section 30 (2). The interest of the Fleetwing Oil Co. Ld. in the hands of the freeholders or in the hands of anybody else, would not have been an interest of a "landlord" within the relevant definition. It therefore follows, as I think, that the question whether that interest might be said to have

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been purchased or created by the freeholders within section 30 (2) need not be further considered. If the interest of the Fleetwing Oil Co. Ld. had by effluxion of time or would by effluxion of time have expired before the tenants made their application, the result, as Mr. Campbell concedes, would have been clear; and I do not think it makes any difference that it would still have subsisted in October, 1954, because then it would have had but five months left of life.

For these reasons, I think, with all respect to Mr. Campbell's argument, that the landlords in the present case are not disqualified as being landlords whose interest for the purposes of section 30 (2) was purchased or created after March, 1950. Although I have based my conclusion on different grounds from those with which the judge dealt, and in so basing my conclusion I have not had to consider the grounds on which he decided in the freeholders' favour, I conclude none the less that the result he arrived at was correct, and, accordingly, this appeal must be dismissed.

JENKINS L.J. I agree, and have nothing to add.

PARKER L.J. I also agree.

Appeal dismissed.

Solicitors: *Benham, Synnott & Wade*; *John F. Chadwick*.

E. D.

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Apr. 27, 28.

Evershed M.R., Hodson and Parker L.JJ.

LAMBE *v.* SECRETARY OF STATE FOR WAR.

Compulsory Purchase—Compensation—Special suitability—Acquiring authority sitting tenant—Purchase of freehold reversion—Merger—"Special suitability or adaptability of the land for any purpose"—Acquisition of Land (Assessment of Compensation) Act, 1919 (9 & 10 *Geo.* 5, *c.* 57), *s.* 2, *rr.* (1), (2), (3).

The Territorial and Auxiliary Forces Association were the lessees of a dwelling-house for a term expiring in 1990 at an annual ground rent of £17 15s. The association had erected in the grounds of the premises a canteen and certain stores. The Secretary of State for War, the acquiring authority, served notice to treat on the claimant for the purchase of the freehold reversion expectant on the lease.

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LAMBE
v.
SECRETARY
OF STATE
FOR WAR.

On the question of the basis for assessing compensation under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2[1]:—

Held, (1) that the expression "special suitability or adaptability "of the land for any purpose" in rule (3) of section 2 of the Act of 1919 referred to the quality of the land, as opposed to the needs of a particular purchaser, and that the fact that a sitting tenant might be prepared to pay more than an investor, in order not to be turned out, did not clothe the land with a special suitability within the rule, the value of which would be ignored.

(2) That under rule (3), the amount which an acquiring authority in a friendly negotiation would be willing to pay in acquiring a freehold interest and as though no compulsory powers of acquisition had been obtained, was to be taken into consideration, unless the authority was able to show that the amount he would pay was enhanced by some suitability or adaptibility of the land for his purposes alone; and that, since no special suitability of the land for the acquiring authority's purpose had been suggested, other than for the purpose of merger, he had failed to prove any special suitability within rule (3); and that, accordingly, the correct basis of compensation was what the acquiring authority, in a friendly negotiation, would be prepared to pay, and as though no compulsory powers had been obtained.

Vyricherla Narayana Gajapatiraju v. *Revenue Divisional Officer, Vizagapatam* [1939] A.C. 302; 55 T.L.R. 563; [1939] 2 All E.R. 317 and *Pointe Gourde Quarrying and Transport Co. Ld.* v. *Sub-Intendent of Crown Lands* [1947] A.C. 565; 63 T.L.R. 486 considered.

APPEAL by case stated from a decision of the Lands Tribunal.

This was a reference by the Secretary of State for War, the acquiring authority, to the Lands Tribunal for the determination of the basis on which the compensation to be paid for property known as "Inniscarra," 53, Bath Road, Reading, should be assessed. On July 14, 1951, pursuant to its statutory powers, the acquiring authority served upon the claimant, Vice-Admiral Charles Edward Lambe, C.B., C.V.O, in whom the fee simple was vested, a notice to treat dated July 13, 1951, for the purchase of the property.

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[1] Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2: "In assessing compensation, "an official arbitrator shall act in "accordance with the following "rules:—(1) No allowance shall be "made on account of the acquisition "being compulsory: (2) The value "of land shall, subject as herein- "after provided, be taken to be the "amount which the land if sold in "the open market by a willing seller "might be expected to realize: Pro- "vided always that the arbitrator "shall be entitled to consider all "returns and assessments of capital "value for taxation made or "acquiesced in by the claimant: "(3) The special suitability or "adaptability of the land for any "purpose shall not be taken into "account if that purpose is a purpose "to which it could be applied only "in pursuance of statutory powers, "or for which there is no market "apart from the special needs of a "particular purchaser or the require- "ments of any Government Depart- "ment or any local or public "authority: . . ."

The property consisted of a large dwelling-house with a coach house and grounds. The Territorial and Auxiliary Forces Association (hereinafter called "the association") held the property on the terms of a lease dated April 5, 1904, for 99 years from June 24, 1891, at a ground rent of £17 15s. per annum. That lease contained a covenant restricting the use of the premises to that of a private dwelling-house only. In December, 1949, the association purchased the leasehold interest for £3,825. Since 1938 the property had been used as the headquarters of a Royal Corps of Signals Unit (T.A.). Before that it had been used as a single dwelling-house. During the association's occupation, but before the purchase of the leasehold interest, the following buildings were erected in breach of the covenants in the lease by the association and were still in existence: (i) Canteen; (ii) Signal store; (iii) Stores. By a deed of release of December 15, 1949, the claimant in consideration of £500 consented to the continuance of the existence and use of these buildings and released certain restrictive covenants.

After setting out the facts stated above the case stated continued: "4. It was agreed by the parties that the matter "for our decision was, which one of the following valuations "(also agreed) was to be adopted as the basis of compensation "in this reference?

"(1) Assessed in accordance with rule (2) of section 2 of the "Acquisition of Land (Assessment of Compensation) Act, 1919, "and on the basis that rule (3) of section 2 of that Act operates "to eliminate the special suitability or adaptability of the free- "hold interest in the land for the purposes of merger with the "leasehold interest, for which purpose there is no market apart "from the requirements of the War Department.

"Ground Rent reserved under Lease (unexpired "term of 39 years)	£17 15 0
"Years' Purchase in perpetuity at 3 per cent.	33·333
	"£591·66

"Cost of Acquisition say £600

"(2) Assessed in accordance with rule (2) of section 2 of "the [Act of 1919] and on the basis that rule (3) of section 2 "of the Act does *not* apply where the purpose is the merger of freehold and leasehold interests, but that nevertheless the principles laid down in the judgment in the Indian case mentioned below do not apply.

"Ground Rent reserved under Lease (unexpired "term of 39 years)	£17 15 0
"Years' Purchase in perpetuity at 2½ per cent.	40
	£710

"(3) Assessed in conformity with the judgment in the Indian case of *Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam*,[2] the value to represent the amount which the acquiring authority, in a friendly negotiation, would be willing to pay in acquiring a freehold interest for its purposes, and as though no compulsory powers of acquisition had been obtained.

"Ground Rent reserved under Lease (unexpired "term of 39 years)	£17 15 0
"Years' Purchase in perpetuity at 1¼ per cent.	80
	£1,420

"Cost of Acquisition say £1,429 10s. 0d. as set out in the "Claim Form dated July 30, 1951.

"On the facts we find:—1. That the subject of the notice to treat, being a freehold interest subject to a lease, is an investment for which there is a free and familiar market not confined to the lessee. 2. That there is a market for the subject apart from the special needs of the acquiring authority (the lessee). 3. That the abrogation or relaxation of a restrictive covenant by means of merger or otherwise constitutes one of the elements of the market value of the freehold interest, which element can be recognized and its value assessed by an investing purchaser of the freehold interest in the open market. 4. That persons engaged in 'friendly negotiation' when the market is not restricted and there is no element of compulsion can be assumed to arrive at open market value.

"5. On the agreed facts and the above finding, we decided as follows:—1. (a) That rule (3) of section 2 of the Acquisition of Land Act, 1919, does not apply, because there is a market for the freehold interest apart from the needs of the lessee,

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[2] [1939] A.C. 302; 55 T.L.R. 563; [1939] 2 All E.R. 317.

"and that therefore in this case the acquiring authority does not "constitute a particular purchaser as defined in the rule. "(b) That a merger of the leasehold with the freehold interest "does not invest the freehold interest with a special adaptability "or suitability for that purpose, for it does not connote a use, "actual or potential, of the land itself. (c) That, accordingly, "valuation 1 does not apply. 2. That, since rule (3) does not "apply, the compensation must be assessed in accordance with "rule (2). 3. That since there is a free market for the subject "land and valuation 3 has been made on the assumption that "it is 'the amount which the acquiring authority in a friendly "'negotiation would be willing to pay in acquiring a freehold "'interest for its purposes and as though no compulsory powers "'of acquisition had been obtained,' the figure so arrived at "corresponds with the statutory basis of compensation laid "down in rule (2), being the value in the open market on the "assumption of a willing vendor. 4. That since a valuation "made in the circumstances set forth in valuation 3 is "correct, valuation 2 has been made on incorrect assumptions. "Accordingly, we adopted valuation 3 as being correct.

"6. The question for the opinion of this Honourable Court "is whether on the above findings of fact we came to a correct "decision in point of law."

B. S. Wingate-Saul for the Secretary of State for War. The court is asked to say which of three methods of valuation is the correct one to apply in this case. The effect of section 2 of the Act of 1919 is that an acquiring authority should not be asked to pay more than an ordinary purchaser. The authority should not pay more because of its anxiety to acquire the property. The first basis is the correct one. A freehold interest has a special suitability to be married to a leasehold interest and that special suitability must, pursuant to rule (3) of section 2, be ignored. The language used by Lord MacDermott in delivering the judgment of the Board in *Pointe Gourde Quarrying and Transport Co. Ld.* v. *Sub-Intendent of Crown Lands*[3] is against this submission, but his Lordship was not there addressing his mind to the present problem.

It is primarily submitted, however, that the correct basis of valuation is the second method of calculation, which is based on the assumption that the principle laid down in the Indian case of

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[3] [1947] A.C. 565, 571; 63 T.L.R. 486.

Vyricherla Narayana Gajapatiraju v. *Revenue Divisional Officer, Vizagapatam*[4] does not apply. The authorities before the Act of 1919 was passed are *In re Gough and the Aspatria, Silloth and District Joint Water Board*,[5] *In re Lucas and Chesterfield Gas and Water Board*[6] and *Inland Revenue Commissioners* v. *Clay*.[7] Rule (3) of the Act of 1919 was passed in consequence of the last-mentioned decision. Those cases indicate the line of reasoning which was followed in the Indian case. They are no longer good law. The proper basis of valuation is the price which could be obtained from an ordinary tenant holding under a lease. During the leasehold term the premises have been made suitable for the tenant's needs. The acquiring authority should not be made to pay for works for which payment has already been made. The third basis of valuation is founded on the Indian case and is wrong.

Niall MacDermot for the claimant. The first method of valuation is wrong. The fact that the freehold reversion expectant on a lease is the subject of the purchase does not give to the land special suitability within rule (3). If it is admitted that rule (3) has no application to this purchase, the second basis of valuation is also inapplicable and the third basis is the correct one to be applied. Unless the case is within rule (3), the basis of assessment is the ordinary market value. Account may be taken of what any purchaser, including the acquiring authority, would be prepared to pay. Where the value of the property is enhanced owing to the special needs of the acquiring authority, the value attributable to these special needs must be included in the value, if it would be included in friendly negotiations, that is, free negotiations not under threat of compulsory purchase. Land may have an enhanced value which has nothing to do with the land as land, as in the *Pointe Gourde* case.[8] The increased value, if basis 3 is adopted, is not due to special suitability or adaptability of the land for the acquiring authority's purposes. The Lands Tribunal was right in applying basis 3.

B. S. Wingate-Saul in reply. If basis 2 is not adopted for assessing the compensation, the acquiring authority will pay too much. If there is no special suitability within rule (3), the market value is what any purchaser other than the acquiring authority would pay.

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[4] [1939] A.C. 302.

[5] [1904] 1 K.B. 417; 20 T.L.R. 179.

[6] [1909] 1 K.B. 16; 24 T.L.R. 858.

[7] [1914] 3 K.B. 466; 30 T.L.R. 573.

[8] [1909] 1 K.B. 16.

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EVERSHED M.R. I will ask Parker L.J. to deliver the first judgment.

PARKER L.J. This is an appeal by the Secretary of State for War, the acquiring authority, from a decision of the Lands Tribunal as to the basis of the compensation payable by the authority for the freehold interest of the claimant in premises known as "Inniscarra," 53, Bath Road, Reading.

The short facts, so far as they are material, are as follows: Since 1938 the property, which consisted of a large dwelling-house on three floors with a coach house and grounds extending to a little over an acre, was occupied by the Territorial and Auxiliary Forces Association, I think, as subtenants. The premises were used as the headquarters of a Royal Corps of Signals unit, and in the course of that occupation the association erected in the grounds a canteen, a signal store and a general stores. Later, in December, 1949, the association purchased the unexpired term of a 99-year lease of the premises due to expire on June 24, 1990, at a ground rent of £17 15s. per annum. Under that lease there was a restrictive covenant under which the premises were to be used as a private dwelling-house only, and by a deed of release dated December 15, 1949, the claimant, who is the tenant for life of the freehold interest, in consideration of a sum of £500, waived the breach of the covenant resulting from the user by the association and substituted a covenant whereby the premises could be used as offices, including, while vested in the association, the provision of a canteen or club. He also authorized an assignment of the lease to the association.

In 1951 the acquiring authority was minded to purchase the freehold interest in the premises, and on July 14, 1951, served on the claimant a notice to treat. Thereafter the matter was referred to the Lands Tribunal, not (be it observed) to determine the amount of compensation payable, but to decide which of three agreed bases of valuation was applicable in the circumstances of the case, namely, in the light of the facts set out above, which were agreed. The tribunal held that the third alternative basis was that to be applied.

Before referring to these three bases of valuation, I would refer, so far as it is material, to the general rules laid down by section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919. By rule (2), the value of the land, which includes by definition any interest therein, "shall, subject as hereinafter "provided, be taken to be the amount which the land if sold in "the open market by a willing seller might be expected to "realize." Prima facie, that would include the value of any potentiality which the land possessed, but by rule (3) it is provided that "The special suitability or adaptability of the land for any "purpose shall not be taken into account if that purpose is a "purpose," and then omitting irrelevant words, "for which there "is no market apart from the special needs of a particular purchaser or the requirements of any Government Department or "any local or public authority." In other words, if one of the potentialities of the land is such that there is only one purchaser of the land with that potentiality, the added amount which he would pay is to be ignored.

The question referred to the tribunal was as follows: "Which "one of the following valuations was to be adopted as the basis "of compensation in the reference? (1) Assessed in accordance "with rule (2) of section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, and on the basis that rule (3) "of section 2 of that Act operates to eliminate the special "suitability or adaptability of the freehold interest in the land "for the purposes of merger with the leasehold interest, for which "purpose there is no market apart from the requirements of the "War Department." There follows a calculation which arrives at a sum of £600. "(2) Assessed in accordance with rule (2) of "section 2 of the Act of 1919 and on the basis that rule (3) "of section 2 of the Act does not apply where the purpose is the "merger of freehold and leasehold interests, but that nevertheless the principles laid down in the judgment in the Indian "case mentioned below do not apply," and the value arrived at on that basis is the sum of £710. "(3) Assessed in conformity "with the judgment in the Indian case of *Vyricherla Narayana* "*Gajapatiraju* v. *The Revenue Divisional Officer, Vizagapatam*,[1] "the value to represent the amount which the acquiring authority, in a friendly negotiation, would be willing to pay in "acquiring a freehold interest for its purposes, and as though no "compulsory powers of acquisition had been obtained," and the amount arrived at on that basis is stated to be the sum of £1,420.

I will deal first with basis 1. For myself, I confess that I do not find the language easy to follow, but clearly this basis is intended to be purely an investment basis, namely, what some outsider—not the sitting tenant—would pay for the freehold interest as an investment. The argument for excluding the

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[1] [1939] A.C. 302; 55 T.L.R. 563; [1939] 2 All E.R. 317.

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sitting tenant as a potential buyer is that the freehold interest, so it is said, has a special suitability for the purpose of marriage to the leasehold interest, that the value of that special suitability will only be paid by the sitting tenant, and, accordingly, that under rule (3) the value of that special suitability is not to be taken into consideration. The Lands Tribunal did not accept this contention; and, in my opinion, they were correct. The expression "special suitability or adaptability of the land" in rule (3) is, I think, clearly referring to the quality of the land as opposed to the needs of a particular purchaser. The fact that the sitting tenant may be prepared to pay more than an investor in order not to be turned out does not clothe the land with a special suitability within that rule, the value of which is to be ignored. Some support for this view is, I think, to be found in the judgment of the Board in the case of *Pointe Gourde Quarrying and Transport Co. Ld.* v. *Sub-Intendent of Crown Lands.*[2] In that case the Crown had acquired lands of the appellants on which there was a limestone quarry. It was purchased for the United States of America in connexion with a naval base which they were erecting nearby, and the stone, when quarried, would have been of particular importance to them on account of their special needs. Section 11 (2) of the local Ordinance was in the same form as rule (3). Lord MacDermott, giving the judgment of the Board, said[3]: "It is, of course, possible that land may have a "special suitability or adaptability for several purposes, and, "where this is so, it may well happen that section 11 (2) will "operate to exclude compensation in respect of some of such "purposes and not in respect of others. But it must be assumed "that the word 'purpose' is used or referred to throughout the "subsection in the same sense. That being so, the expression "'if that purpose is a purpose to which it could be applied only "'in pursuance of statutory powers' indicates, in their Lord-"ships' view, that the word is employed in the subsection as "meaning a purpose to which *the land* can be applied. It there-"fore connotes a use, actual or potential, of the land itself, and "cannot be regarded as meaning a purpose which is only "concerned with the use of the products of the land elsewhere."

It is, I think, convenient to deal with bases 2 and 3 together, and here the language used is even less felicitous than that used in basis 1. It only adds to the confusion, I think, to refer to the compensation in the present case as falling to be assessed

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[2] [1947] A.C. 565; 63 T.L.R. 486.

[3] [1947] A.C. 565, 571.

"in conformity with the judgment in the Indian case" (basis 3), and "on the basis that the principles laid down in the Indian "case do not apply" (basis 2), because the Indian case was, of course, decided not under the Acquisition of Land Act, but under the local law, and that local law laid down principles for determining compensation which differed in no material respect from those in operation in this country under the Lands Clauses Act of 1845; that is, before the Acquisition of Land (Assessment of Compensation) Act, 1919, came into operation. On analysis, however, I think that the intention of the parties, in putting forward these two bases in this form, is reasonably clear. In effect, the local law in the Indian case made applicable the principles embodied in rule (2). There was no exception in the nature of rule (3). Bearing this in mind, I think that basis 3 is intended to be a valuation of what the acquiring authority as sitting tenant would be prepared to pay, assuming that the land had no special suitability for the authority alone, whereas basis 2 is intended to be what an ordinary sitting tenant would be prepared to pay on the basis that under rule (3) the price which the authority would pay is excluded.

Prior to the introduction of rule (3) by the Act of 1919 it was always the law—and it was forcibly restated by Lord Romer in the Indian case—that the amount which the authority, in a friendly negotiation, would be willing to pay in acquiring a freehold interest and as though no compulsory powers of acquisition had been obtained, was a matter to be taken into consideration. Equally, since the introduction of rule (3), that amount was to be taken into consideration, unless the acquiring authority are able to show that the amount he would pay was enhanced by some suitability or adaptability *of the land* for his purposes alone.

Accordingly, the question is whether in this case the acquiring authority can show that rule (3) applies so as to eliminate from consideration what he would be prepared to pay. As I understand it, however, no special suitability *of the land* for his purposes was suggested other than that already referred to in connexion with basis 1, namely, for the purposes of merger. Accordingly, having failed to prove any special suitability within the rule, basis 3 is the correct basis.

I should add that at one time I was pressed by the fact that, although no special facts in regard thereto had been agreed, and although there was no specific finding, yet there must here be in fact some special suitability, in that the value arrived at under basis 3 is double that arrived at under basis 2. However, neither the Lands Tribunal nor this court is concerned with the question of amount, but only with the correct basis of valuation; and, whatever the result, I am clear that on the facts as agreed no special suitability of the land has been shown.

Finally, Mr. Wingate-Saul suggested that the price which the authority was prepared to pay ought to be ignored, on the ground that otherwise the value would be enhanced solely due to what he referred to as "the scheme." It is well settled, as was said by Lord MacDermott in the *Pointe Gourde* case,[4] that "compensation for the compulsory acquisition of land cannot include "an increase in value which is entirely due to the scheme "underlying the acquisition," in that case the construction of a naval base in the vicinity; but it does not follow that in all cases the price which an authority having compulsory powers will pay should be ignored. In the Indian case, Lord Romer, after referring to the judgment of Fletcher Moulton L.J. in *In re Lucas and Chesterfield Gas and Water Board*,[5] said this[6]: "It must, "of course, be conceded that the existence of the scheme must "not be allowed to enhance the price, if by 'scheme' is meant "the fact that compulsory powers of acquisition have been "obtained for the purpose of carrying into effect a particular "scheme for the profitable use of the potentiality. The valuation "must always be made as though no such powers had been "acquired, and the only use that can be made of the scheme is as "evidence that the acquiring authority can properly be regarded "as possible purchasers. But their Lordships have some "difficulty in seeing why the taking into consideration of the fact "that the special value exists for those purchasers only should "be said to be allowing the existence of the scheme to enhance "the value of the lands. The only difference that the scheme "has made is that the acquiring authority, who before the "scheme were possible purchasers only, have become purchasers "who are under a pressing need to acquire the land; and that "is a circumstance that is never allowed to enhance the value." Further, in an earlier passage, Lord Romer said[7]: "The "disinclination of the vendor to part with his land and the urgent "necessity of the purchaser to buy must alike be disregarded. "Neither must be considered as acting under compulsion. This "is implied in the common saying that the value of the land "is not to be estimated at its value to the purchaser. But this "does not mean that the fact that some particular purchaser

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[4] [1947] A.C. 565, 572.

[5] [1909] 1 K.B. 16; 24 T.L.R. 858.

[6] [1939] A.C. 302, 319.

[7] Ibid. 312.

"might desire the land more than others is to be disregarded. "The wish of a particular purchaser, though not his compulsion, "may always be taken into consideration for what it is worth." In the present case, basis 3 is specifically stated to be on the basis of the value which the acquiring authority, in a friendly negotiation, would be willing to pay in acquiring a freehold interest for its purposes, and as though no compulsory powers of acquisition had been obtained. I would uphold the decision of the tribunal and dismiss the appeal.

Hodson L.J. I agree and have nothing to add.

Evershed M.R. I am also of the same opinion.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Hewett, Pim & Clarke, Reading.*

B. A. B.

PARK ESTATE (BRIDLINGTON) LD. v. EAST RIDING COUNTY COUNCIL.

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Mar. 30, 31.
Denning and Parker L.JJ., Roxburgh J.

Town and Country Planning—Enforcement notice—Form—Compliance with statutory requirements—Development before appointed day—Notice not specifying breaches of previous planning control—Notice in substance complaining of breaches of planning control after appointed day—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *ss.* 23, 24, 75.

A local planning authority served an enforcement notice, under the Town and Country Planning Act, 1947, on the owners of a holiday camp which had been developed prior to July 1, 1948, the appointed day under the Act. The notice stated that the development specified thereunder appeared to be in contravention of planning control, gave particulars of the structures complained of, and required the owners to discontinue the use of the land as a holiday camp and to turn it back to agriculture. The notice did not specify whether the development complained of contravened planning control before or after the appointed day, and did not on its face refer specifically to any section of the Act, but notes on the back of it referred to sections 23 and 24 of the Act (applicable to development of land without permission carried out after the appointed day) and did not refer to section 75 (which is concerned with development of land carried out in contravention of planning control under earlier Acts).

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On a complaint by the owners, justices refused to quash the notice, but on appeal to the Divisional Court it was held that the notice was bad. On appeal by the local planning authority:—

Held, that the enforcement notice, fairly construed in the light of the provisions of the Act of 1947, was a notice which complained only of breaches of planning control after the appointed day; and that as the development specified was before the appointed day and one in respect of which no permission was required under the Act of 1947, the owners were entitled to have the notice quashed on that ground under section 23 (4) of the Act.

Lincolnshire (Parts of Lindsey) County Council v. *Wallace Holiday Camp Ld.* [1953] 2 Q.B. 178; sub nom. *Lincoln County Council (Parts of Lindsey)* v. *Henshall* [1953] 1 All E.R. 1143 approved.

Decision of the Divisional Court (Lord Goddard C.J., Cassels and Lynskey JJ.) affirmed.

APPEAL from the Divisional Court (Lord Goddard C.J., Cassels and Lynskey JJ.) on a case stated by the justices for the East Riding of the County of York.

The following facts, agreed between the parties, were found by the justices: (*a*) An enforcement notice for the purposes of the Town and Country Planning Act, 1947,[1] dated April 26, 1951, was duly served by the East Riding County Council, as the local planning authority under the Act, on the Park Estate (Bridlington) Ld., relating to land known as Limekiln Lane Camp (Bridlington), of which the company were the owners. (*b*) The use of the land as a site for temporary dwellings (or holiday camp) began in 1934. (*c*) All development on the land material to the issues before the justices was carried out before July 1, 1948, the appointed day for the purposes of the Act of 1947. The notice was in the following terms: It was headed: "East "Riding County Council. Town and Country Planning Act, "1947. Enforcement Notice" and addressed to "the secretary, "the Park Estate (Bridlington) Ld. . . . and to whom it may "concern." It continued: "The County Council of the "Administrative County of York, East Riding, hereby give notice "that the development or other matter hereunder specified "appears to them to be in contravention of planning control, "namely: the erection or placing and the use for residential and "ancillary purposes of temporary dwellings and other erections "on land known as Limekiln Lane Camp": there followed particulars of the dwellings and other erections concerned. It continued: "And they hereby require that the following steps "shall be taken within two years from the date on which this

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[1] Town and Country Planning Act, 1947, s. 23: "(1) If it appears to the "local planning authority that any "development of land has been carried "out after the appointed day without "the grant of permission required in "that behalf under this Part of this "Act, or that any conditions subject "to which such permission was "granted in respect of any development have not been complied with, "then, subject to any directions given "by the Minister, the local planning "authority may within four years of "such development being carried out, "if they consider it expedient so to "do having regard to the provisions "of the development plan and to any "other material considerations, serve "on the owner and occupier of the land "a notice under this section. (2) Any "notice served under this section "(hereinafter called an 'enforcement "'notice') shall specify the development which is alleged to have been "carried out without the grant of "such permission as aforesaid or, as "the case may be, the matters in "respect of which it is alleged that "any such conditions as aforesaid "have not been complied with, and "may require such steps as may be "specified in the notice to be taken "within such period as may be so "specified for restoring the land to "its condition before the development "took place, or for securing compliance with the conditions, as the "case may be; and in particular any "such notice may, for the purpose "aforesaid, require the demolition or "alteration of any buildings or works, "the discontinuance of any use of "land, or the carrying out on land of "any building or other operations. ". . . (4) If any person on whom an "enforcement notice is served under "this section is aggrieved by the "notice, he may, at any time within "the period mentioned in the last "foregoing subsection, appeal against "the notice to a court of summary "jurisdiction for the petty sessional "division or place within which the "land to which the notice relates "is situated; and on any such appeal "the court—(*a*) if satisfied that permission was granted under this "Part of this Act for the development "to which the notice relates, or that

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"no such permission was required in "respect thereof, or, as the case may "be, that the conditions subject to "which such permission was granted "have been complied with, shall "quash the notice to which the appeal "relates . . ."

S. 75: "(1) Where any works on "land existing at the appointed day "were carried out, or any use to which "land is put on that day was begun, "in contravention of previous planning control, then, subject to the "provisions of this section, the provisions of Part III of this Act with "respect to enforcement notices shall "apply in relation thereto as they "apply in relation to development "carried out after the appointed day "without the grant of permission in "that behalf under the said Part "III: . . .

"(5) In relation to an enforcement notice served by virtue of "this section, subsection (4) of "section twenty-three of this Act "shall have effect as if for paragraph "(*a*) thereof there were substituted "the following paragraph:—'(*a*) if "'satisfied that the works or use to "'which the notice relates are not "'works or a use to which section "'seventy-five of this Act applies, "'shall quash the notice to which the "'appeal relates' . . .

"(9) For the purposes of this "section, works on land shall be "deemed to have been carried out, "and uses of land to have been "begun, in contravention of previous "planning control—(*a*) where at the "material time the land was subject "to a resolution to prepare a planning "scheme, if carried out or begun otherwise than in accordance with permission granted in that behalf by or "under the interim development order; "(*b*) where at the material time the "land was subject to a planning "scheme, if carried out or begun "otherwise than in conformity with "the provisions of the scheme or of "permission granted thereunder; . . ."

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"notice takes effect:—(1) The use of the said land for residential "purposes shall be discontinued. (2) The said temporary "dwellings and other erections shall be removed or demolished "and the materials thereof removed from the said land. (3) Any "materials, sheds, huts or fences brought on to or erected on "the said land in connexion with the construction, use or demolition of the said temporary dwellings and other erections shall "be removed. (4) Every use of the said land except the use "thereof for the purposes of agriculture shall be discontinued. "Subject to the provisions of the above-mentioned Act, this "notice will take effect at the expiration of twenty-eight days "after service hereof. Expressions used in this notice have the "meanings assigned to them by the above-mentioned Act, except "where the context otherwise requires. Dated this twenty-sixth "day of April, 1951." At the foot of the notice was a note: "Your attention is drawn to the notes set out on the back of "this notice"; and on the back, under the heading 'Notes': "Section 23 of the Act provides that at any time before this "notice takes effect" and there followed a summary of the effect of sections 23 and 24 of the Act.

On May 22, 1951, the company preferred a complaint against the county council under section 23 (4) of the Act of 1947, seeking as a person aggrieved by the enforcement notice to have the notice quashed by appeal to the justices.

The company contended that (*a*) the Act was highly technical, and as it encroached on private rights the court must insist on strict and rigid adherence to formalities. (*b*) The enforcement notice was defective in substance and form, and should be quashed and treated as a nullity. (*c*) The notice was defective on the following grounds:— (i) Neither section 75 nor any other section of the Act of 1947 was referred to on its face and only section 23 was referred to in the Notes on the back of the notice. (ii) Alternatively, if the notice was under any specific section, it was obviously a notice under section 23, by the reference to that section in the Notes on the back, and, as the development alleged was prior to the appointed day, it was not a development without permission under the Act; accordingly section 23 did not apply, and the notice was bad. (iii) The words "in contravention of "planning control" were ambiguous and should have read "in "contravention of previous planning control" if the notice were intended to operate under section 75. (iv) The notice should have specified the nature of the development, as in *Lincolnshire* (*Parts* *of Lindsey) County Council* v. *Wallace Holiday Camp Ld.*[2] (v) The notice said " it appears to the county council," etc., and the company were entitled to know what the development alleged was. The notice did not in fact specify any development. The notice could have said that it contravened a resolution of the council to prepare a planning scheme, or was in breach of conditions or in breach of an interim development order, or could otherwise have specified in what way planning control had been contravened. but it did not say what had been done wrong, or specify anything indicating what the breach of planning control was, and the company was entitled to know what the alleged contravention actually was. (vi) The notice should also have specified which matters were developments within the meaning of the Acts. Line 1 of the notice contained the words " or other " matter." The notice should have specified what were the developments under the Acts and what were " other matters," as all that the Acts prohibited was a " development." (vii) The date of the alleged development was not specified in the notice. The development had begun 20 years ago; the notice should have alleged which developments were before July 1, 1948, and which after that date. (*d*) If one or more of the defects were accepted by the court the enforcement notice should be quashed as a nullity.

It was contended by the county council that:— (*a*) Neither the Act, nor any rule of law, nor decided case, required that an enforcement notice should indicate the section or sections of the Act on which it was based; nor was there any requirement that an enforcement notice should state whether the development or other matter to which the notice related had been carried out, or had originated before or after the appointed day. (*b*) The enforcement notice clearly complied with section 23 (2) of the Act of 1947, which required the specification of the development alleged to be contravening, but did not require anything further to be specified or stated regarding such development. The actual dates on which any development had been carried out would, in any event, be best known to the recipient of the notice. (*c*) The Notes on the back of the notice did not form part of it, and the reference to section 23 of the Act in those Notes related specifically to the rights of appeal by the company against the notice.

The justices were of opinion that:— (*a*) The Notes on the

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[2] [1953] 2 Q.B. 178; [1953] 1 All E.R. 1143.

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back of the enforcement notice did not form part of the notice, inasmuch as the notice would have been complete without them. (*b*) There was no requirement in section 23 of the Act or elsewhere that the section or sections of the Act on which an enforcement notice was based should be specified in the notice, and *Lincolnshire* (*Parts of Lindsey*) *County Council* v. *Wallace Holiday Camp Ld.*[2] did not afford authority for that proposition. (*c*) The omission from the enforcement notice of reference to particular sections of the Act was not misleading. (*d*) The enforcement notice properly referred to the Act as a whole. (*e*) The notice was not defective in substance and form. The justices accordingly dismissed the appeal.

The company appealed to the Divisional Court and on January 14, 1955, the court allowed the appeal, and held that the notice was bad. Lynskey J., giving the judgment of the court, said that the present case was not distinguishable from the *Lincolnshire* case,[2] which had decided that it must be brought home to a person receiving a notice complaining about development exactly what was the complaint made; that the present notice was bad because there was nothing in it to indicate in any way that it was dealing with pre-Act-of-1947 development or any development to which section 75 applied; and that the dictum of Lord Goddard C.J. in the *Lincolnshire* case,[3] that "the justices . . . had power to quash here because permission "under the Act of 1947 was not required in respect of a development which had been carried out before July 1, 1948," and that "if that development was carried out in contravention of "planning control which existed at that time, that should be "alleged and the notice should so specify," was applicable to the present case. The court, accordingly, held that although the notice was not required to be in any specified form, it was a notice which ought to give the person who received it a clear indication as to what it was intended to apply and what development it was sought to remedy; and allowed the appeal.

The county council appealed.

B. J. M. MacKenna Q.C. and *W. L. Roots* for the county council. It is submitted, first, that the Act of 1947, by section 23 (1) read with section 75, provides for the service of an enforcement notice either (*a*) if it appears to the local authority that any development of land has been carried out after the appointed day—July 1, 1948—without the grant of permission, or (*b*) if it appears to the local authority that any works on land existing at the appointed day were carried out, or any use to which the land was put was begun, in contravention of "previous planning "control." Section 23 (2) provides for the contents of the enforcement notice; it may require such steps as may be specified in the notice to be taken, e.g., restoring the land, demolition of buildings, or discontinuance of a use. But it does not require that the notice shall specify the date when the development took place, nor whether it is alleged that it took place before or after the appointed day.

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[2] [1953] 2 Q.B. 178.

[3] Ibid. 183.

[DENNING L.J. If a man is put under this charge of breaking the law, must he not be told what the charge is?]

This is not a criminal offence, although the effects on the owner may be serious in that he may be required to demolish buildings without receiving compensation. But there is no obligation on the authority under the Act to specify whether the development complained of was pre- or post-Act of 1947 development. The dictum of Lord Goddard C.J. in *Lincolnshire* (*Parts of Lindsey*) *County Council* v. *Wallace Holiday Camp Ld.*[3] that the notice should specify those matters was obiter and does not apply here. That case is distinguishable on its facts, for the notice there was on its face a notice alleging post-Act development under section 23; and it was rightly held that it should have been given under the machinery provided by section 23 read with section 75.

[DENNING L.J. The notice in that case is quite different from the one we are considering.]

The *Lincolnshire* case [3] is the only authority on this point.

Secondly, it is submitted that on a fair construction of this notice the local authority has not limited itself to an allegation that the alleged development was carried out after the appointed day. Though it is conceded that it would have been better if section 75 had been specifically brought in, and that the only section to which reference is made—in the Notes on the back of the notice—is section 23, the document read as a whole could not mislead the recipient, and the justices found that the omission of particular sections was not misleading. The Notes on the back are not part of the notice itself, but merely indicated to the recipient what his remedy or right of appeal was.

Thirdly, the person on whom the notice is served has a right of appeal under section 23 (4) to a court of summary jurisdiction; but the powers of the court are limited as follows: (i) where the development was after the appointed day the court can quash the notice if it is satisfied that permission was granted under the Act of 1947 or that no such permission was required; and (ii) where development was carried out before the appointed day it is empowered to quash the notice if it is satisfied that the works or use to which the notice relates were not works or use to which section 75 applies. In either case it is the owner who must satisfy the court that the notice should be quashed, either by proving that the development took place before the appointed day and did not contravene previous planning control, or that it took place after the appointed day and that permission was given or was not required. There is no great hardship in that reading of the provision, for the owner is more likely to know that date than is the local authority which serves the notice. Since the jurisdiction is so limited, it follows that even if this court holds that the notice should have specified whether the development complained of was pre- or post-Act of 1947, that is only a defect, an invalidity of a kind with which the court cannot deal by quashing the notice. [*Keats* v. *London County Council* [4] was also referred to.]

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[3] [1953] 2 Q.B. 178, 183.

G. R. Hinchcliffe Q.C. and *Alan S. Orr* for the company. An enforcement notice must specify whether it refers to a contravention of planning control under the Act of 1947 or to a contravention of "previous planning control" under the earlier Acts and section 75 of the Act of 1947, because non-compliance with the notice, if not a criminal offence, is at least breaking the law, and a landowner is entitled to be given sufficient particulars to enable him to check whether he is committing an offence or not. He has only 28 days in which to lodge an appeal. Moreover, the Act is a serious interference with the rights of property, and any ambiguity in construction or any doubt as to the validity of an enforcement notice should be construed in the owner's favour.

Entirely different problems arise on a contravention of the existing control under the Act of 1947, and a contravention of "previous planning control." It is easy to discover by reference to section 12 of the Act whether there has been a contravention of control after the appointed day; but it is much more difficult to discover whether there has been a pre-Act contravention. Development without permission was allowed under the earlier

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[4] [1954] 1 W.L.R. 1357; [1954] 3 All E.R. 303.

Acts until a scheme was brought into operation; and in the period between the Acts of 1932 and of 1947 there may have been no scheme at all in operation in a particular area. Nothing in the Town Planning Act, 1932, requires the landowner to assume that there is such a scheme in existence until the contrary is proved, whereas the local authority would have knowledge of any such scheme. It is thus essential that landowners should be given particulars of the scheme which they are alleged to have infringed.

Further, the word "development" in the Act of 1947 has a meaning different from "development" under the Act of 1932; the period of limitation for serving the notice is different; and there are other differences which make it necessary that there should be words specifying the contravention alleged, for that would immediately put the landlord on inquiry. That is precisely what the present notice fails to do. It purports to allege a contravention of the control in the Act of 1947 and does not allege any contravention of "previous planning control" under section 75. It is thus a bad notice, for it does not comply with the requirements of sections 23 and 75 read together. The Divisional Court was right in both this and in the *Lincolnshire* case.[5] [*D'Alessio* v. *Enfield Urban District Council*[6] was also referred to.]

The present notice is defective on the following grounds: (*a*) It fails to specify on its face that it is a notice under sections 23 and 75. Even if it is not necessary to do so on the face of the notice, a landowner should at least be able to discover by reading the document as a whole which sections do apply. Nothing in this notice would direct him to section 75. The only section referred to in the document as a whole (including the Notes on the back) is section 23. (*b*) The words "the development or other "matter hereunder specified appears to be in contravention of "planning control" cannot refer to section 75 (1), the words of which are "in contravention of previous planning control." (*c*) The notice fails to specify what is alleged to be the breach of "previous planning control." It does not indicate the previous control, if any, or suggest that a planning scheme existed which might have been contravened. (*d*) The notice refers on its face to "the development or other matter," whereas section 23 (2) requires only that the "development" should be specified. On this document a landowner cannot tell which of the items set out are alleged to be "development" and which "other matter."

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[5] [1953] 2 Q.B. 178.

[6] [1951] 2 T.L.R. 859; [1951] 2 All E.R. 754; [1951] W.N. 503.

(*c*) The notice should have specified and related the date of the alleged development to the date of any planning scheme under the Town Planning Act of 1932 or other Acts prior to 1947 which it was alleged to be contravening.

[PARKER L.J. Before the magistrates can quash this notice under their limited jurisdiction it must be shown, not only that it is defective, but that on its true construction it points to a post-Act development.]

Yes; and that can be shown in that (i) the notice is headed "Town and Country Planning Act, 1947"; (ii) the words of the document indicate that this was a notice under section 23, namely, post-Act development, because there is no reference to "previous" planning control under section 75; and (iii) the notice draws attention to Notes on the back where the only reference is to section 23 of the Act of 1947. As Lynskey J. said, anyone reading the document as a whole would believe it to relate to a contravention of control under the Act of 1947.

MacKenna Q.C. replied.

DENNING L.J. At Bridlington there is a holiday camp which has been there since 1934. On July 1, 1948, the Town and Country Planning Act, 1947, came into operation. Nearly three years later, on April 26, 1951, the East Riding County Council, who are the planning authority for the area, served an enforcement notice on the company which runs this holiday camp. By this notice the county council required the company to discontinue the use of the land as a holiday camp and to turn it back into agricultural land. The question for our consideration is whether the enforcement notice was valid.

This depends on the true construction of the Act of 1947, and in particular sections 23 and 75 of the Act. Section 23 deals with post-Act development and section 75 with pre-Act development. Section 23 says that if any development is carried out after July 1, 1948, without the grant of permission, or in breach of conditions, then within four years the planning authority can serve an enforcement notice on the owner; and in subsection (2) it provides: "Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with." That section deals only with development after July 1, 1948.

Before July 1, 1948, the development of land was subject to the previous planning control under the Town Planning Act, 1932, as modified and amended by the Act of 1943. The Act of 1947 contained provisions for dealing with breaches of this previous planning control. It enabled enforcement notices to be served in those cases also. Section 75 provided that where works existing on July 1, 1948, were carried out, or any use to which land was put on that date was begun, in contravention of previous planning control, then the provisions of the Act with respect to enforcement notices were to apply with relation thereto as they applied in relation to development carried out after the appointed day; but an enforcement notice was not to be served after three years from July 1, 1948. The latest date, therefore, for taking proceedings for previous contraventions was July 1, 1951.

The development of this holiday camp was long before July 1, 1948. The East Riding County Council had therefore to serve an enforcement notice before July 1, 1951, and they did so on April 26, 1951. In my judgment, an enforcement notice, in order to be valid, ought to specify the particular development which is complained of. It could be one of three things: first, development carried out after July 1, 1948, without permission; secondly, breach of conditions after July 1, 1948; thirdly, development before July 1, 1948 in contravention of previous planning control. Those three complaints raise such different considerations that it seems to me to be necessary to the validity of the notice that it should specify clearly and distinctly which of them is charged against the owner in question. Mr. MacKenna said that a breach of planning control is not a criminal offence; but it may have the most serious consequences for an owner; and in my opinion it is only right and proper that an enforcement notice should specify clearly and distinctly the particular contravention which is alleged.

Now I turn to this notice to see whether it does specify clearly and distinctly the complaint against the owner. [His Lordship read the notice and continued:] There is this rather significant note: "Your attention is drawn to the notes set out on the back "of this notice"; and then on the back of the notice, under the heading "Notes," it says: "Section 23 of the Act provides that "at any time before this notice takes effect"—and then there is summarized the effect of section 23 and section 24 of the Act. There is no mention whatever of section 75.

It seems to me that, on a fair reading of that enforcement notice, it complains only of breaches of the existing planning control since July 1, 1948, and not at all of breaches of previous planning control. The notice starts off with a direct reference to the Act of 1947 and no earlier Act; it refers to "development," which is a term particularly defined by the Act of 1947 and has a much wider meaning in that Act than in other Acts; it refers simply to "planning control" and not to "previous planning "control"; and, finally, it refers on the back to section 23 without a single reference to section 75. These considerations lead me to the conclusion that this notice complains only of contraventions after July 1, 1948.

What, then, is the position? The owner of the land, faced with such a notice, can properly say that he was not guilty of the contravention alleged against him. No permission was required under the Act of 1947 in respect of his development, because it was a development which had taken place before July 1, 1948. It is a case, therefore, where he can come to the court under section 23 (4) of the Act of 1947 and ask for the notice to be quashed.

I find myself in agreement with the decision of the Divisional Court in *Lincolnshire (Parts of Lindsey) County Council* v. *Wallace Holiday Camp Ld.*,[1] and indeed with all that Lord Goddard C.J. said there, and further, with the judgment in the case under appeal. I would dismiss this appeal.

PARKER L.J. I agree. The Town and Country Planning Act, 1947, set up a new scheme of planning control to operate as from the appointed day, July 1, 1948. There were new town planning authorities, a new definition of "development," and a new scheme; but as part of that Act, a part entitled "Part "VIII. Application to Special Cases," a provision was made whereby the new town and country planning authorities could take up and deal with cases where there had been breaches of previous planning control, that is to say, the scheme of control which operated up to July 1, 1948. In these circumstances, when by section 23 (2) it is provided that an enforcement notice shall specify the development which is alleged to have been carried out, it seems to me to be essential—and I agree with all that my Lord has said—that the notice should specify which breach of control is complained of, whether a breach of the control existing up to the appointed day or after the appointed day. I do not desire, however, to elaborate that, because it seems to me that any views on what should be specified in the enforcement notice must be obiter, since this case depends on the power of magistrates to quash the notice, and those powers are strictly limited by section 23 (4) of the Act. They cannot quash when a notice is invalid because it is defective in some way; they can only quash on certain limited grounds, and the only ground on which they could quash in this case is if the notice was a notice dealing with the breach of what I may call current planning control, and it was shown that because the development took place before the appointed day no permission under the Act of 1947 was required.

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[1] [1953] 2 Q.B. 178; [1953] 1 All E.R. 1143.

Accordingly, the only point is whether, on its true construction, and on a fair reading of it, the enforcement notice in this case is one dealing with a breach of previous planning control or of current planning control. As regards that, I find the present case indistinguishable from the *Lincolnshire* case [1] to which my Lord has referred. In that case the enforcement notice itself purported to be served pursuant to section 23, whereas in regard to a breach of previous planning control it would have to be served by virtue of section 75. Further, in the *Lincolnshire* case [1] the notice refers to "development which "has been carried out within the meaning of the [1947] Act," and speaks of no permission having been granted. The court decided that on a fair reading that notice must be taken to be a notice of a breach of town planning control.

Despite the difference in the wording of the notice in the present case, I can find no real difference. The development complained of here, as stated in the notice, is a contravention of planning control, and I should have thought that "planning "control" in connexion with the Act of 1947 must be read as, and not be read otherwise than as, referring to current planning control, the new scheme of control set up under the Act of 1947. The position would have been entirely different if the words of section 75 had been used, namely, "previous planning control"; and if the matter were in any doubt it seems to me to be cleared up by the fact that the person on whom the notice was served is asked to read the notes on the back, which are notes dealing with the effect of section 23, and section 23 only.

Accordingly, I cannot distinguish the present case from the *Lincolnshire* case, and as Lord Goddard C.J. pointed out in that case,[2] it being, as here, a notice under section 23 alone, once it appeared before the magistrates that what was really complained

[1] [1953] 2 Q.B. 178.

[2] Ibid. 183.

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of was a development prior to the appointed day, it was open to them to hold, as they did, that no permission under the Act of 1947 was required, and accordingly it came within the wording of subsection (4) of section 23, which entitled them to quash the notice. I would dismiss this appeal.

Roxburgh J. I agree.

Appeal dismissed. Leave to appeal to the House of Lords granted, conditional on the county council agreeing to pay the respondents' costs of such appeal.

Solicitors: *Sharpe, Pritchard & Co. for R. A. Whitley, Beverley; Corbin, Greener & Cook for Lambert & Parkinson, Bridlington.*

M. M. H.

C. A.
1955
July 4, 5.

Evershed M.R., Jenkins and Parker L.JJ.

X.L. FISHERIES LD. *v.* LEEDS CORPORATION.

[Plaint No. L. 980.]

Landlord and Tenant—Act of 1954*—Business premises—Tenants' request for new tenancy—Sale of reversion to local authority—Application to Minister for certificate of change of use—Notice to tenants within two months of tenants' request—Effect pending grant of certificate—Landlord and Tenant Act,* 1954 (2 & 3 *Eliz.* 2, *c.* 56), *ss.* 26, 57 (1), (4) (*b*).

On November 22, 1954, the tenants of business premises holding under a lease within the scope of Part II of the Landlord and Tenant Act, 1954, served on the landlord a request for a new tenancy to commence on the termination of the current tenancy. On January 19, 1955, the landlord, not having served any notice on the tenants objecting to the grant of a new tenancy, sold the reversion to the local authority, who immediately applied to the Home Secretary, pursuant to section 57 of the Act of 1954, for a certificate that it was requisite for their purposes that the use or occupation of the premises should be changed as from the date on which the current tenancy terminated. On the same day (within two months after the tenants' request) the local authority wrote to the tenants informing them that they had bought the premises and that they would object to the grant of a new tenancy. They further informed the tenants of their application for a certificate under section 57. The tenants having applied to the county court, the local authority was ordered to grant a new tenancy. On appeal:—

Held, that the change of landlord after the tenants had requested the landlord to grant them a new tenancy did not preclude the local authority from relying on the privileges afforded to public authorities by section 57; accordingly, pending the decision of the

Home Secretary whether to grant a certificate, the tenants' request became of no effect.

Per curiam. A landlord, whether a public authority or not, who acquires his interest within two months after the tenant has requested a grant of a new tenancy is not disabled from serving a notice under section 26 (6) and objecting to the grant on one or more of the grounds specified in section 30 (1) (*a*) to (*f*) which exist at the date when the notice of objection is served, assuming that the predecessor in title of the landlord has not before the sale already served notice of objection on the tenant.

Quaere what the position would be, vis-à-vis the tenant, of a purchaser of the reversion if the landlord had served a valid notice of objection before selling his interest, the sale having been completed within two months of the tenants' request for the new tenancy.

Appeal from Judge McKee sitting at Leeds County Court.

X. L. Fisheries Ld. were the tenants of business premises known as 12, Town Street, Chapel Allerton, Leeds, holding under a lease dated April 2, 1948, for the term of seven years from March 1, 1948, at a yearly rent of £100 payable monthly. The premises were used as a fried fish shop. On November 22, 1954, the tenants made a written request to the landlord, Beatrice Mary Hewitt, for a new tenancy to begin on June 1, 1955. On January 19, 1955, the landlord, not having served on the tenants any notice objecting to the grant of a new tenancy, sold the premises to the Leeds Corporation, who required them as an extension to the city police premises adjoining the premises. On the same day, that is, within two months of the tenants' request for a new tenancy, the corporation informed the tenants that they had bought the premises and intimated that they would not agree to the grant of a new tenancy. They further stated that, as was the case, they had made an application to the Home Secretary, the Minister concerned with police matters, under section 57 of the Landlord and Tenant Act, 1954,[1] for a certificate that it was

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[1] Landlord and Tenant Act, 1954, s. 24: "(1) A tenancy to which this "Part of this Act applies shall not "come to an end unless terminated "in accordance with the provisions "of this Part of this Act; and, subject "to the provisions of section 29 of "this Act, the tenant under such a "tenancy may apply to the court for "a new tenancy . . . (*b*) if the tenant "has made a request for a new ten-"ancy in accordance with section 26 "of this Act . . ."

S. 26: "(1) A tenant's request for "a new tenancy may be made where "the tenancy under which he holds "for the time being (hereinafter "referred to as 'the current ten-"'ancy') is a tenancy granted for "a term of years certain exceeding "one year, whether or not continued "by section 24 of this Act, or granted "for a term of years certain and "thereafter from year to year. (2) A "tenant's request for a new tenancy "shall be for a tenancy beginning requisite for the purposes of the corporation that the premises should be occupied by the Leeds city police from March 1, 1955 "with such date, not more than "twelve nor less than six months "after the making of the request, as "may be specified therein: Provided "that the said date shall not be "earlier than the date on which apart "from this Act the current tenancy "would come to an end by effluxion "of time or could be brought to an "end by notice to quit given by the "tenant. . . . (6) Within two "months of the making of a tenant's "request for a new tenancy the land-"lord may give notice to the tenant "that he will oppose an application "to the court for the grant of a new "tenancy, and any such notice shall "state on which of the grounds "mentioned in section 30 of this Act "the landlord will oppose the appli-"cation."

S. 29: "(1) Subject to the provi-"sions of this Act, on an application "under subsection (1) of section 24 "of this Act for a new tenancy the "court shall make an order for the "grant of a tenancy comprising such "property, at such rent and on such "other terms, as are hereinafter pro-"vided. . . . (3) No application "under subsection (1) of section 24 "of this Act shall be entertained "unless it is made not less than two "nor more than four months after "the giving of the landlord's notice "under section 25 of this Act or, as "the case may be, after the making "of the tenant's request for a new "tenancy."

S. 57: "(1) Where the interest of "the landlord or any superior land-"lord in the property comprised in "any tenancy belongs to or is held ". . . by a local authority . . . the "Minister . . . in charge of any "Government department may certify "that it is requisite for the purposes ". . . of the authority . . . that the "use or occupation of the property "or a part thereof shall be changed "by a specified date. (2) A certifi-"cate under the last foregoing sub-"section shall not be given unless the "owner of the interest belonging or "held as mentioned in the last fore-"going subsection has given to the "tenant a notice stating—(*a*) that the "question of the giving of such a "certificate is under consideration by "the Minister . . . and (*b*) that "if within 21 days of the giving of "the notice the tenant makes to that "Minister . . . representations in "writing with respect to that ques-"tion, they will be considered before "the question is determined, . . . "(4) Where a tenant makes a request "for a new tenancy under section 26 "of this Act, and the interest of the "landlord or any superior landlord in "the property comprised in the "current tenancy belongs or is held "as mentioned in subsection (1) of "this section, the following provisions "shall have effect:—(*a*) if a certifi-"cate has been given under the said "subsection (1) in relation to the "current tenancy, and within two "months after the making of the "request the landlord gives notice to "the tenant that the certificate has "been given and the notice contains "a copy of the certificate, then,—(i) if "the date specified in the certificate "is not later than that specified in "the tenant's request for a new "tenancy, the tenant shall not make "an application under section 24 . . . "for the grant of a new tenancy; "(ii) if, in any other case, the court "makes an order under Part II of "this Act for the grant of a new "tenancy the new tenancy shall be "for a term expiring not later than "the date specified in the certificate "and shall not be a tenancy to which "Part II of this Act applies; (*b*) if "no such certificate has been given "but notice under subsection (2) of "this section has been given before "the making of the request or within "two months thereafter, the request "shall not have effect, without "prejudice however to the making of "a new request when the Minister ". . . has determined whether to "give a certificate."

(that was, immediately on the expiry of the current tenancy), or as soon thereafter as the Secretary of State might consider to be reasonable. On March 21, 1955, the tenants, acting pursuant to section 24 (1)[1] of the Act, applied to the county court for the grant of the lease which they had requested the landlord to grant. The corporation in answer to the application contended that, by virtue of section 57 (4) of the Act of 1954, the tenants' request became of no effect so soon as notice of the making of the application to the Home Secretary had been served on them, and that, consequently, they were not entitled to apply to the court for a new tenancy. The county court judge accepted the submission made on behalf of the tenants that section 57 (4) would only operate if, at the date of the tenants' request, the interest of the landlord had been held by the corporation, and he ordered that a new tenancy should be granted.

The corporation appealed.

Nigel Bridge for the corporation. By section 57 (4) of the Landlord and Tenant Act, 1954, where a local authority, as landlord of property within the Act, has within two months of the tenant's application for a new tenancy applied for a certificate but there has not been sufficient time for the Minister to decide the application, the tenant's claim for a tenancy is in suspense. A local authority is not precluded from taking advantage of these suspensory provisions in cases where, as here, they acquired the property after the date when the tenant made his request for a new tenancy, but in time to make application to the Minister under section 57 and to give notice to the tenant that they had done so, that is, within two months after the date of the tenant's request (hereinafter called the "two months' period"). If the local authority is able to take advantage of section 57 (4) it does not mean that the tenant is necessarily unable to obtain a new tenancy. All that section 57 (4) (*b*) does, if it applies, is to render the tenant's request ineffective, but without prejudice to his right to make a new request. If, therefore, the Home Secretary concludes that it is not requisite for the police to have possession of the premises, or if he specifies a postponed date for possession, it will be open to the tenants to make a new request.

Further, if a tenancy is refused, pursuant to a certificate under either section 57 or section 58, compensation is payable under section 59.

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[1] See note on p. 637.

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[PARKER L.J. If the landlord sets the machinery in motion by giving notice under section 25 (6), he has to anticipate the grounds on which he will rely in objecting to an application, and if there is after that a change of landlord within the two months' period, the new landlord will merely inherit the grounds stated by his predecessor in title, since no provision is made for amendment.]

If the machinery is set in motion by such a notice by the landlord, the grounds on which objection may be made crystallize then, but if it is set in motion by a request under section 26, the moment when the grounds for objection crystallize is the date two months after the date on which the tenant made his request. Section 30 sets out the grounds on which a landlord may successfully oppose the grant of a new tenancy, and nothing in that section requires the landlord who seeks to object to the grant to show that he was the landlord to whom the tenant's request was made. A notice of objection must be served on the tenant within the stipulated period, but, subject to that limitation, a landlord who acquires the property after the tenant has made his request can rely on any of the grounds stated in section 30 which are applicable at the date when he serves his notice. If the ground on which he relies is within (*a*), (*b*) or (*c*) he can adopt a notice already served by his predecessor in title, for the personality of the landlord is irrelevant under these heads. The ground stated in (*f*) is personal to the landlord seeking to oppose, but, if the landlord's interest changes hands after a notice has been served under this head, the new landlord may be able to show that he, like his predecessor in title, intends to demolish the premises, or it may be that the new landlord can show that he has such an intention in a case where no notice was served by his predecessor on this ground. In either case the new landlord can rely on (*f*). Section 30 (2) expressly provides, however, that a landlord who has acquired the property within the period there stated may not take advantage of the ground of objection stated in (*g*). This emphasizes that, apart from that express provision, there is no time limit to be read into section 30. Since no time limit is imposed on private individuals or on public authorities under section 30, it would be surprising and illogical to find that a disability should be imposed on public authorities who acquire a property within the two months' period and seek to take advantage of section 57.

It is grammatically possible that the use of the present tense twice in the formula " Where a tenant makes a request for a new " tenancy . . . and the interest of the landlord . . . belongs or is " held as mentioned in subsection (1) . . ." requires that the two things mentioned should be contemporaneous, but it is not the natural meaning of subsection (4). In section 24 (3) (*b*) of this Act the draftsman has shown clearly that he intended contemporaneity, and, similarly, in section 1 of the Leasehold Property (Repairs) Act, 1938. See also section 21 of the Landlord and Tenant Act, 1927. The natural meaning of the subsection, having regard to the scheme of the provisions, is that " where " in this subsection, as in sections 33 and 37, is really equivalent to " a " case in which," and not to " when at the time of making the " request." It is setting the stage for the operative provisions of the subsection, not introducing a time barrier. Since no reason for introducing a time barrier is apparent, it is submitted that the construction which is more consonant with the general scheme of the Act should be preferred.

Even if the contrary construction of subsection (4) is preferred, it will not avail the tenant, for the local authority can take advantage of subsection (5). That subsection is no doubt intended to be used in cases where the local authority cannot take advantage of subsection (4) because they cannot say with sufficient certainty when the property will be required, but subsection (5) is not limited to that type of case. Under that subsection the authority can apply to the Minister or Board up to the time when the tenant makes application to the court, or possibly even up to the time when his determination is decided. Having regard to the scope of subsection (5), there would appear to be little purpose in imposing a time barrier in subsection (4) on landlords who acquired after the tenant's request had been made and in time to serve a notice on him within the two months' period.

Finally, it should be borne in mind that this is an Act which derogates from the common law rights of landlords, whether private individuals or local authorities, and, therefore, where two constructions are possible the court will prefer the construction which cuts down the landlord's rights least.

Gilbert Rountree for the tenants. The special privileges in section 57 are only available to public authorities who are landlords at the time when a request for a new tenancy is made. Section 57 (4) must be given its literal meaning, and " where " as used in that subsection implies a particular moment of time which governs both the clauses which follow. The present tense is used in both of those following clauses to show that the two circumstances must be contemporaneous. The interest of the landlord must be held as is provided in subsection (1), not at any relevant time, but at the time when the tenant makes his request for a new tenancy. The construction for which the corporation contend deprives "where" of all positive meaning in this context and involves reading into the clause referring to the interest of the landlord after "is held" the additional words "or becomes "held."

Although a public authority which purchases after the tenant has made a request for a new tenancy may not be able to take advantage of section 57 (4), it may in some instances be able to use the privileges afforded by subsection (5), though it is probable that that provision may not have been intended for use in a case where the authority is able to know when possession of the property will be required with sufficient precision to satisfy subsection (4). It is, however, important to notice that the standard required before a certificate can be granted is more stringent under subsection (5) than under the preceding subsection. Part IV of the Act contemplates three separate types of circumstance in which certificates affording the special privileges to public authorities ought to be granted. Section 57 (4) deals with the least urgent of these, that is, where an authority shows that it is "requisite" for its own purposes that possession should be granted to it. Under subsection (5) it is the public interest which is at stake, and in this and in subsection (7) (where the reason is national security) the Minister or Board must be satisfied that possession is "necessary." With the rising scale of urgency and of the higher standard of proof in subsections (5) and (7) it is not surprising to find that the time barrier requiring, as is submitted, that the authority should have been the landlord at the time when the tenant's request was made is omitted. Instead, in subsection (5) the authority is enabled at any moment up to the date on which the tenant makes application to the court to apply to the Minister or Board for a certificate, and in subsection (7) there is no time barrier at all.

An authority acquiring after the tenant has made a request for a new tenancy but within the two months' period may not be excluded from relying on the "section 30" grounds of objection to the grant (except, of course, the ground stated in (*g*)), but section 57 confers special privileges which are not available to ordinary private individuals, and it is not unreasonable, therefore, to find that limitations as to time should be imposed which are not found in relation to the "section 30" grounds.

Section 58 also begins with the word "where," but there the draftsman has started with the continuing state of ownership and then referred to the second event, which is something occurring at a particular moment of time. It would be more difficult to contend in that section that contemporaneity of the two circumstances was intended than in section 57 (4), where the continuing state is mentioned after the momentary event which fixes the relevant moment.

It was submitted on behalf of the corporation that, since this is an Act which affects the common law rights of landlords, if there is any ambiguity, the construction which affects their rights least should be preferred. Section 57 is, however, an exception to the general purposes of the Act and should be construed narrowly. Nor does it help the corporation to say that the construction which they favour is more consonant with the general scheme of the Act, for this section stands apart from the general scheme, which is not concerned to protect local authorities, but to enable persons having business premises to carry on in the same premises, notwithstanding that their landlords may want to do something else with the premises.

Nigel Bridge replied.

Evershed M.R. This appeal has raised a difficult, though short, question of the construction of certain sections of the Landlord and Tenant Act, 1954, and I should like at once to acknowledge the debt that we all feel to counsel who have on each side assisted us with their argument. The difficulty emerges from the somewhat troublesome subject-matter and the complex nature of the language used in dealing with that subject-matter; but, put very briefly, the question is this: the Act gives to a tenant who holds a lease or tenancy having certain defined characteristics, and here the interest of the tenants is of that kind, a right to apply for the grant, in certain circumstances, of a new lease. The tenant's landlord in such an event is given by the Act certain rights of opposition or of seeking to limit the tenant's right to continued security of tenure. The present question arises because the personality of the landlord in this case changed after the date when the machinery of the Act was first invoked by the tenants; and that question is whether all (or, if not all, some, and particularly one, which I will later specify) of the possible weapons put into the hands of the landlord are available here to the Leeds Corporation which became the landlord after the date of the tenants' request. [His Lordship stated the facts and continued:]

The question which has to be determined is whether the corporation's application to the Home Secretary having been made within the two months, the corporation can now invoke certain provisions of the Act, in particular section 57 (4); for, if so, the result will be that, pending the determination by the Secretary of State whether to grant the necessary certificate, the request which the tenants originally made is in suspense; it has ceased to be effective. But, as will be observed, if the Secretary of State decides not to grant the certificate, then the tenants will be able to set the machine again in motion. If, on the other hand, the Secretary of State grants the certificate, then it will be plain, if the corporation is right, that the tenants will lose any right to obtain a new lease under the Act and will receive instead, as the corporation acknowledges, compensation under section 59.

Having regard to the periods of time which are mentioned in the Act, it must, I think, be plain that occasions will occur when the landlord, at the time when the first move is made by the tenant, ceases to be the landlord before the final trick is turned, if I may use that phrase. It is a question, and a serious question, whether that inevitable happening was really in the contemplation of Parliament or of the draftsman in these sections. I am inclined for myself to think that the possibility may not have been thought of when the Act took its shape. Certainly, if it was thought of, the draftsman forebore to make any express reference to it. In arriving at a conclusion, I think that it is of great importance to bear in mind what the effect would be, in the ordinary case of an individual landlord who became such a landlord after the date of the original request by the tenant, but before the question had finally been determined.

I will pass, therefore, to a reading of certain of the sections of the Act which deal with the matter I have last mentioned, namely, the ordinary case where the landlord has no special privileges by virtue of being a local authority or government department. The part of the Act which deals with those ordinary cases is Part II, which bears the general heading "Security of "tenure for business, professional and other tenants." Mr. Bridge, in his opening of the case, read the substance of the sections, beginning with section 24 and continuing to the end of section 31. I hope that I shall not be shirking my proper duty

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if I do not read all those sections, but refer to the effect of them, with such references to the language as seem essential. After section 23 (which specifies what type of tenancy is within this Part of the Act and which is irrelevant) the subject-matter opens with section 24 (1), which reads: "A tenancy to which this Part "of this Act applies shall not come to an end unless terminated "in accordance with the provisions of this Part of this Act; and, "subject to the provisions of section 29 of this Act, the tenant "under such a tenancy may apply to the court for a new tenancy "—(*a*) if the landlord has given notice under the next following "section to terminate the tenancy, or (*b*) if the tenant has made "a request for a new tenancy in accordance with section 26 of "this Act." The first of the two alternatives (that is, that of the landlord giving notice) is covered by section 25. That section provides, among other things, that if the landlord does give notice, it is essential, for that notice to be effective, that the tenant should be required within two months of the giving of the notice to tell the landlord whether or not he is willing to give up possession. The notice must also indicate, if the tenant is not willing to give up possession, what are the grounds on which the landlord would oppose an application by the tenant for an extension of his tenancy.

The second alternative, that of the tenant's initial request, is provided for by section 26. That section provides that the tenant should forward to the landlord a request for a new tenancy within a certain period, in such a case as the present, before the end of the existing tenancy (a condition which has again been here complied with), and section 26 (6) indicates what the landlord's position will be on receipt of such a request. Subsection (6) is important; it provides: "Within two months of the making of a "tenant's request for a new tenancy the landlord may give "notice to the tenant that he will oppose an application to the "court for the grant of a new tenancy, and any such notice shall "state on which of the grounds mentioned in section 30 of this "Act the landlord will oppose the application." I can leave out, for present purposes, sections 27 and 28. Section 29 provides for the appropriate application which has to be made to the court, where, to take this kind of case, a request has been made and the landlord has given notice of opposition. It is to be noted that the tenant cannot apply to the court by virtue of subsection (3) until, at any rate, the two months, which is the period specified in section 26, have expired. I mention that, because it is important in the scheme of the Act to note that, however quickly a landlord might respond to the request, the stage of application could never be reached before two months had expired from the date of the request.

Section 30 sets out, as anticipated, the grounds on which the landlord may base his opposition. There are altogether seven of them. They are not all quite of the same kind, and as to one of them (namely, the case in which the landlord intends to occupy the premises for his own purposes) there is a special qualification required of a landlord seeking to rely on that specification based on the date when he himself acquired his interest. In the view I take, I do not find it necessary to pursue that particular matter, though it was relied upon and referred to in the course of the argument, because of the language used in reference to dates. Certain of the objections, as one might expect, are based on alleged infringements by the tenant of his duties as tenant; but one which I shall take because it will illustrate sufficiently my argument is that lettered (*f*), namely, that on the termination of the current tenancy the landlord intends to reconstruct the premises comprised in the holding and cannot reasonably do so without obtaining possession.

The question is whether those sections contemplate or require that the landlord, throughout the whole period after the machinery of the Act has been set in motion, should be the same person, whether an individual person or a persona ficta. I think that the answer to that question is inevitably in the negative. I can find nothing in the sections or the language used therein which would require the continuity throughout of the same person as landlord; and, indeed, it would be a strange thing if the Act did so require, because, though Parliament may do many things, it cannot insist that a particular person shall live a particular length of time. It is, in other words, I think quite plain that when the landlord comes to put in his notice of opposition, it is sufficient if at the time he puts it in he is in fact the landlord. It is, therefore, sufficient if he, having acquired the premises or the reversion since the date of the request, is able to say when he puts in his notice of opposition before the two months' period expires that he is the landlord and (to take the example that I chose from section 30) that on the termination of the current tenancy he intends to reconstruct.

During the course of the argument this further question was somewhat debated, and I will say at once that, finding it unnecessary to give an answer to it, I prefer to leave it until it actually arises for determination. The question is this: suppose that landlord A. had within the two months given notice of opposition based on intention to reconstruct, under section 30 (1) (*f*), and then, still within the two months, sold the premises to landlord B.—what is B.'s position until the two months have expired? Is he (so to speak) limited and bound by the objections that landlord A. has intimated? Is he free to abandon them and substitute new ones? Or is he left without any effective opposition at all? As I have said, I do not find it necessary to answer that somewhat difficult question, and I, therefore, pass it by, saying only this, that the presence of that possible difficulty does not seem to me to qualify the conclusion I have already expressed, that so far, in the ordinary case contemplated by Part II, I find nothing which could sensibly produce the result that the landlord must continue the same landlord throughout the whole period of the operation of the scheme of this part of the Act.

That circumstance, I think, is of overriding importance when I come to deal with the question which arises in this particular case under the somewhat special provisions of section 57. That section is not within the embrace of Part II of the Act. It is part of Part IV, which is headed " Miscellaneous and " supplementary " and deals with a number of somewhat special and rather divergent subject-matters. Section 57, however, is concerned with the case where the interest of the landlord is held by what I will call compendiously a public authority, that is, a government department, a local authority, a statutory undertaker or a development corporation; and, as will be apprehended in this case, we are concerned with the second member of that category, namely, a local authority. A number of subsections have this in common, not only in this section itself, but elsewhere in the Act and, indeed, in other enactments to which Mr. Bridge has drawn our attention: they open with the formula " Where " such and such a thing is done and something else exists or happens. I take, for example, section 57 (1): " Where the " interest of the landlord . . . in the property comprised in any " tenancy belongs to or is held for the purposes of a Government " department," etc., then the Minister in charge of the Government department " may certify that it is requisite for the pur" poses of the . . . department, or, . . . the [local] authority . . . " that the use or occupation . . . shall be changed by a specified " date." One gets, in the subsection to which our attention is specially directed in this appeal, subsection (4): " Where a tenant " makes a request for a new tenancy " under Part II " and the " interest of the landlord . . . in the property comprised in the

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"current tenancy belongs or is held as mentioned in subsection "(1)"—that is, in this case, by a local authority—"the following "provisions shall have effect." Again, subsection (5): "Where "application is made to the court under Part II"—that is section 29—"for the grant of a new tenancy and the landlord's interest in "the property . . . belongs or is held as mentioned in subsection "(1)." Again, in subsection (7) there is the same formula, though a transposition of the order (so to speak) in which the matters mentioned are introduced: "Where the interest of the "landlord . . . in the property . . . belongs to" (in that case) the National Trust, then the Minister may certify; and again similarly in section 58: "Where the landlord's interest in the "property . . . belongs to or is held for the purposes of a "Government department, and the Minister . . . certifies that "for reasons of national security it is necessary . . ."

The question which emerges at once from the reading of the subsections, is this, to take the particular problem under subsection (4): is the use of the present tense twice in the formula which I have mentioned such as to signify an intention by Parliament that the two events, the two things mentioned, should be contemporaneous, "Where a tenant makes a request . . . and "the interest of the landlord . . . belongs"? Is it the proper intention (that is, the proper result of the terminology used) that the interest of the landlord must "belong" at the same time as the tenant makes a request? It will be noticed, of course, that the events or happenings are not entirely of the same kind. The making of a request is a specific event, a thing done on a particular date; the conception of the interest "belonging" is not a reference to a particular moment of time, but to a period of time. That, though obvious, does not help much. The question is: is the period of ownership intended and specified one that must extend so as to cover the time of the making of the request?

Before I seek to give my answer to that problem, I must state what are the particular privileges, for such they are, which this section confers upon the public authorities mentioned. From my reading of subsection (1), it will be apprehended that these privileges arise because the public authority seeks a certificate that it is requisite for the purposes of the authority that the use or occupation of the property should be changed. In the present case the corporation wish to have it certified that it is requisite that the use of these premises shall be changed from that of being a fried fish and chip shop to being part of the city's police premises. When that matter is in contemplation, the procedure contemplated is that the authority applies to the requisite Minister—in this case the Secretary of State for Home Affairs. Under the Act, upon making such an application for a certificate, the owner of the interest, the landlord (in this case the corporation), must inform the tenant that he is making that representation to the Minister, and the tenant is given thereby an opportunity to put his point of view also to the Minister. If that is the stage reached (and that has been done here) then, by subparagraph (*b*) of subsection (4), the request "shall not have "effect, without prejudice . . . to the making of a new request "when the Minister . . . has determined . . ."; but it is essential that the request for the certificate and the notice of the making of it should have been given within two months from the date of the request. That is specifically set out in subparagraph (*b*): "if . . . notice under subsection (2) of this section has been given " . . . within two months thereafter," that is after the making of the request. I am concerned only with a case such as has arisen here. It may be that in other cases a notice will have been given before any request was made, but I am only, as I say, concerned with this particular case and, by the terms of the section, within the two months such notice has to be given. It was given; and I can now restate the problem: having regard to the opening language of section 57 (4), is the landlord entitled to rely upon (*b*), to say that within two months of the making of the request the notice has been given and, therefore, that the request is not to have effect pending the Minister's determination, although at the time of the making of the request the corporation was not the landlord at all? That is the problem.

Without taking time to expand this matter unduly, there are other privileges given in this and the succeeding section to public authorities generally, all of a particular kind. Thus, in subsection (5), though the public authority there mentioned may not be in a position to call upon a Minister or invite a Minister to certify that it is requisite for the purposes of that department that the use or occupation shall be changed, nevertheless it may call upon the government department to certify that it is necessary in the public interest that any new lease should be terminable by six months' notice on the landlord's side. Again, section 58 (which I mentioned earlier) deals with the case where a government department calls upon the Minister to certify that, for reasons of national security, the use or occupation shall be changed. It was conceded in argument that these special privileges which public authorities may have, circumstances giving them special rights for limiting what otherwise would be a tenant's statutory claim for a new tenancy, are in addition to the ordinary rights which a landlord of any kind may have or has under Part II; that is to say, the fact that the landlord is a local authority (for example, the Leeds Corporation) in no way disables the corporation from setting up by way of opposition one or other of the "section 30" grounds; and I have already said that, leaving aside the case where landlord A. has already put in a notice of opposition and is then succeeded by landlord B., to my mind it is tolerably clear that a local authority who became landlord after the date of the request would not be disabled from putting in, within the two months' period, a notice of opposition based on any one or more of the "section 30" grounds.

If that is right, it will be seen that, upon the general scheme of the Act, a local authority which has special grounds of objection should not, prima facie, be any more disabled from relying on the special ground, because the local authority had become landlord since the request, than it would be in relying upon one of the general "section 30" grounds. If it were so, it would seem to me illogical that a local authority should be deprived only of the chance of setting up the special privilege cases under section 57 merely because it happened to have become landlord after the date of the request. That is, of course, another way of putting the second head of Mr. Bridge's argument, that the view for which he contended is the one more consonant with the general scheme of the Act. But I think, on the whole, and in addition to that argument, that the language of subsection (4) itself, upon its natural meaning, should not be read as limiting the order of events there stated, so as to make it necessary that the interest of the landlord should belong or be held by the same person throughout the whole period from the date of the making of the request. The formula "Where a tenant makes a request "and the property is held" is, I think, simply a draftsman's well-established way of expressing what might otherwise be put in the form "In the case where a tenant makes a request, then, if "certain events are shown to exist, certain consequences follow."

Mr. Bridge referred us to the use of that kind of formula in, for example, the Landlord and Tenant Act, 1927, s. 21, and in the Leasehold Property (Repairs) Act, 1938, s. 1, and elsewhere in this Act; and he at any rate showed instances (of which that from the Leasehold Property (Repairs) Act is one) that if real contemporaneity is intended, then it is expressed.

Section 24 (3) (*b*), of this Act itself, is an instance where such contemporaneity is intended and expressed; for there Parliament says "where, *at a time when a tenancy is not one* . . . the "landlord gives notice to quit."

There is no reference here which would put the matter beyond doubt, such as "and at the time of making the request the "interest is"; and particularly if I bear in mind the scheme to which I earlier referred. I think the natural meaning here is more naturally expanded to this effect: "Where (that is in a case in "which) a tenant makes, (that is has made), a request and the "interest of the landlord *at any relevant time* belongs or is held." If that is a right reading, then it is sufficient if the interest is held at the time when, by the section, the landlord is called upon to do anything. The landlord, it will be remembered, is so called upon if a certificate has not been given but application has been made therefor. The giving of notice of that application is the thing which has to be done; and it seems to me that if the landlord is a landlord of the nature specified in subsection (1) when he gives that notice, then (in the same way as it suffices if he is the landlord when he gives a notice under Part II) it suffices if he shows he is at that time the landlord.

I was somewhat troubled by comparing subsection (4) and subsection (5). Subsection (5) begins "Where application is made "to the court . . . and the landlord's interest . . . belongs or is "held." I was inclined to think that in such a case the essential point of time was the making of the application and that the landlord's interest must be shown to be of the nature specified when the application is made. I think now that that may not be right. I think it may well be sufficient if the interest of the landlord is of the requisite nature when the application is dealt with. But, whether that is so or not, here there is no such necessary or natural crystallizing of rights by the mere making of the request or that which follows when the court's jurisdiction is invoked. As I said a moment ago, I think that I have perhaps upon this particular point and in regard to the contrast between these two subsections felt a greater difficulty than either of my brethren. They at any rate both take the view that, the general scheme of the Act being as it is, there is no good ground for giving to the language in subsection (4) a meaning which would produce an illogical result. It is here conceded that the language is equivocal; and, if that is so, then plainly the duty of the court is to give to the language a meaning which conforms with the general scheme of the Act, rather than one which does not. It is not difficult to imagine other cases which can arise under one or other of these subsections and which will be exceedingly difficult to solve. Instances were given during the course of the argument. I do not propose to indulge in such academic exercises. I only mention them for this reason—that no case has been given by way of illustration in the argument which would tend to show, to my mind, that one view rather than another of subsection (4) would not fit with some other imagined case. In other words, I have not been satisfied that the view to which I have myself come will create some other anomaly in the Act. Knowing the hazards of the construction of statutes, I will not assert that my conclusion is incapable of producing further difficulties in the future, and in the argument (and I have already acknowledged the skill with which the case has been presented) I can see no obstacle, derived from the consideration of other subsections, to what I think, on the whole, is the more natural meaning of subsection (4) (treating it as a somewhat technical formula in any case) and is a meaning consonant with the earlier part of the Act.

That view is contrary to that which commended itself to the county court judge. He thought that, looking at the subsection itself, contemporaneity was intended. I have felt some sympathy with that view, but, with all respect to the judge, considered in all its context, I cannot accept it. I have come to a different conclusion and think that the appeal should be allowed and that the corporation is entitled to the order which it seeks.

Jenkins L.J. I agree and find nothing I can usefully add.

Parker L.J. I also agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for R. Crute, Leeds; Gibson & Weldon for Bretherton, Ditchburn & Nelson, Sunderland.*

E. D.

LONDON COUNTY COUNCIL *v.* WILKINS (VALUATION OFFICER).

SAME *v.* KNIGHT (VALUATION OFFICER).

C. A.

1955
Mar. 29, 30.

Evershed M.R.
Jenkins and
Romer L.JJ.

Rates and Rating—Rateable occupation—Building contractors' huts—Site handed over to contractors with rights of access reserved—Whether rateably occupied—Huts not affixed to ground—Whether part of hereditament.
Chattel—Fixture.

Building contractors, having entered into a contract with a county council to build a school on a site owned by the council, erected on the site, for the purpose of carrying out the contract, various temporary structures used for offices, stores and a canteen. The site had been handed over to the contractors but the council retained certain specific rights of access. Two of the structures had corrugated iron sides and roofs and the others were wooden sectional buildings with wooden roofs and wooden floors on sleepers. None of the buildings was affixed to the ground other than by its own weight. They remained on the site for about 18 months and were then dismantled. The council appealed against a proposal by the local rating authorities to amend the valuation list by adding thereto these structures as a rateable hereditament:—

Held, (1) (assuming that the structures formed part of the hereditament) that the contractors were in rateable occupation of the structures since (i) the contractors were in actual possession; (ii) notwithstanding the reservation of rights of access to the council, the contractors were in exclusive occupation; (iii) the possession was of undoubted benefit and value to the contractors for the purpose of the contract on which they were engaged, and (iv) the possession was not, on the facts, for too transient a period.

John Laing & Son Ld. v. *Kingswood Assessment Committee* [1949] 1 K.B. 344; 65 T.L.R. 80; [1949] 1 All E.R. 224 applied.

(2) Although the structures were no further affixed to the land than by their own weight, they were not independent chattels in the sense that they could be brought on to the site in the condition in which they were when erected and removed at will in that condition—each of them was a structure which could only exist as such so long as it remained assembled on the site; and, accordingly, while on the land the structures became part of it for rating purposes.

City of Glasgow Assessor v. *Gilmartin*, 1920 S.C. 488; and observations of Lord Wright M.R. in *Westminster Corporation* v. *Southern Railway Co.* [1936] A.C. 511; 52 T.L.R. 541; [1936] 2 All E.R. 322 applied.

APPEAL by case stated from the Lands Tribunal.

The London County Council appealed against a decision made on January 23, 1951, by the Local Valuation Court for North-East

London, by which it was directed that a hereditament described as "offices, stores and canteen, etc.," situated at Walker Street school site, referred to as the "building site," in the occupation of F. R. Hipperson & Son Ld., referred to as the "contractors," should be added to the valuation list of the Stepney Metropolitan Borough rating area at gross value £35, rateable value £24. The decision of the valuation court was affirmed on appeal by the Lands Tribunal.

At the hearing before the Lands Tribunal the following facts, set out in paragraph 2 of the case, were stated to have been proved or admitted: "(i) The London County Council owned at all "material times the" building site ". . . and intended to build "thereon a school. In order to carry the said intention into "effect the London County Council and the contractors entered "into a contract dated March 30, 1950. . . . (ii) In pursuance "of the said contract the London County Council handed over "the building site to the contractors on December 12, 1949. "In or about January, 1950, the contractors brought onto the "building site and erected thereon certain huts, more particu-"larly described hereunder: A. General foreman's and time-"keeper's office. Wooden sectional hut with wood roof covered "by tarred felt, wood floor on sleepers; dimensions, 9 ft. by "12 ft. 9 ins., area 114 sq. ft. Dismantled early in September, "1951. If assessed separately, gross value attributable was £4." B. was a temporary building used as an office for the clerk of works of the London County Council, and it was agreed that this structure should be excluded. "C. Cement store. Corru-"gated iron sides and roof with concrete floor. Dimensions: "9 ft. by 14 ft., area 126 sq. ft. Dismantled on June 30, 1951. "If assessed separately gross value attributable was £5. D. Can-"teen and store. Wooden sectional hut with wood roof covered "by tarred felt, wooden floor, standing on old roadway or play-"ground site. Dimensions: 14 ft. 10 ins. by 30 ft., area 445 sq. "ft. Dismantled on June 30, 1951. If assessed separately the "gross value attributable was £17. E. Plumbers' store. Corru-"gated iron sides and roof, standing on old roadway or playground "site. Dimensions: 8 ft. by 12 ft., area 96 sq. ft. Dismantled "on June 30, 1951. If assessed separately the gross value "attributable was £3." Excluding the office of the council clerk "of works the gross value, if the huts were held to be rateably "occupied, should be £29, and the rateable value £20.

"(iii) The said huts [that is, huts A, C, D and E] were "erected on the actual building site, no particular area of "which was set aside for that purpose. The contractors "chose where to erect each of the said huts on the building "site. The said huts were used for the following purposes: "A. General foreman's and timekeeper's office. This was "where the general foreman kept his drawings and the time-"keeper his books. One or two implements—a theodolite "and various odds and ends of builders' materials were stored "here. The office was not used for anything except work in "connexion with building the school. It was moved once during "the course of building operations from one position to another "on the building site. . . . C. Cement store. This was used "solely for the storage of cement. D. Canteen and store. This "contained forms and a table; electric light was laid on; and "there was a stove fixed in the corner, with a pipe through "the roof, for heating water and for tea. There were no "other cooking facilities, and no food was provided there. "E. Plumbers' store. This was used solely for the storage of "plumbers' goods. (iv) The tools, builders' materials and "cement referred to in the last preceding subparagraph hereof "were brought onto the building site solely for the purposes of "the said contract. (v) The said huts were locked by the "contractors each night and the keys were kept by the con-"tractors' foreman. The clerk of works could demand admission "to the said huts at any time, but as the keys were in the "possession of the contractors he could only enter the said "huts when admitted by the foreman or other employee of the "contractors."

The contract of March 30, 1950, referred to in paragraph 2 (i) of the stated case and annexed to it, provided by clause 2 for the carrying out of the work in accordance with the specifications and so forth, at a price of some £83,000. Clause 10 gave the architect various rights of entry and access to the site and to the contractor's workshops and so forth. By clause 11 the contractor, except as otherwise stipulated, had to "provide and "bear the expense of all materials, plant, labour" and so forth, required "for properly executing the works."

Clause 14 provided: "The council expressly reserves to "itself the right to occupy for its own purposes at any time, "and for so long a time, as the architect may (by notice in "writing to the contractor) require, any part or parts of the site "of the works, whether work is in progress or not, and to employ "thereon agents and workmen in the execution of matters not "the subject of this contract." By the same paragraph it was

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provided that the contractor should not obstruct such agents and workmen and should provide them with reasonable access, and so on.

By clause 18: "Unless otherwise directed, the contractor "shall commence the works within three days after the date of "the order to commence given in writing by the architect, and "shall complete the same within the period limited in that "behalf in the said specification." Clause 20 included the following provision: "The council will, with the architect's "written order to commence the works, give to the contractor "the use of so much of the site as may, in the opinion of the "architect, be required in order to enable the contractor to "commence and continue the execution of the works, and will "from time to time, as the works proceed (but subject as aforesaid) give the contractor the use of such further parts of such "site as the architect may from time to time consider proper in "that behalf."

The First Schedule to the contract consisted of a specification, the first part being entitled "Preliminary," in which was set out in different language, sometimes with different effect, several of the matters already provided for in the body of the contract itself. Paragraph 6 provided: "The contractor will be allowed "to use for the execution of the works and for the storage of "materials, etc., the area shown by pink colour on the said "site plan." On the "said site plan" the entire site for the erection of the school was coloured pink.

By paragraph 8: "The whole of the site (indicated by pink "colour on the said site plan) will be made available for the "contractor's use immediately upon the issue of the order to "commence provided for in clause 16 hereof." By paragraph 10 the contractor was required to provide, amongst other things, all plant, material, sheds, messrooms, "and whatever else may be "required for the proper and efficient execution and completion "of the works."

Paragraph 16 provided: "Unless otherwise directed, the con-"tractor shall commence the works within three days after the "date of the order to commence given in writing by the architect "and shall complete the same within a period of 12 calendar "months from the date of such order." By paragraph 37 the contractor had to "provide for receiving and for the requisite "storage and safe keeping during and after delivery on the works "of all stores and articles supplied by the council."

Paragraph 39 required the contractor to provide an office for the use of the clerk of works. Paragraph 39A contained certain provisions in the event of there being an assessment to rates in respect of temporary buildings on the site, but nothing in either paragraph 39 or 39A was relevant for the purposes of the appeal.

By paragraph 68: "The architect and any person or persons "authorized by him shall be at liberty to enter upon the site "of the works at all reasonable times, whether during working "hours or not, and the contractor shall give the necessary "instructions for the admission of the architect or any person "or persons authorized by him. The contractor is to give every "facility to the architect or his representative for the inspection "of material and work in progress at his workshops and elsewhere "and on the site."

G. D. Squibb and *Lord Croft* for the council. To be in rateable occupation the contractors must have exclusive possession of the premises. Legal possession is not sufficient; the contractors must have something more than a mere right to possession; they must have the actual use of the premises. The occupation must not be of a purely transitory character. The quality of the occupation in this case does not satisfy that test. The contractors were in possession only as licensees and their right of occupation was subject to the right of the architect for the council to enter on the site and into the huts. The structures brought on to the site were, moreover, only chattels; they were part of the contractors' plant: *Mitchell Bros. Ld.* v. *Worksop Union.*[1] As in *Westminster Corporation* v. *Southern Railway*,[2] it is not that these structures were inherently non-rateable, but the question is who ought to be rated in respect of them. In *Westminster Corporation* v. *Southern Railway*[2] there was no doubt that the station was rateable, the only question being whether certain sections had been carved out in such a way that they were separately assessable.

In *John Laing & Son Ld.* v. *Kingswood Assessment Committee*[3] Lord Goddard C.J. visualized the kind of problem here in question when he postulated the case of a site used for storage purposes—such as for buckets and scaffolding poles. That was the lowest end of the scale, but at the other end of the scale was

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[1] (1904) 1 Konst. 181; 21 T.L.R. 156.

[2] [1936] A.C. 511; 52 T.L.R. 541; [1936] 2 All E.R. 322.

[3] [1948] 2 K.B. 116, 122; 64 T.L.R. 407; [1948] 1 All E.R. 943.

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the type of case where the structures in question were really part of the contractor's organization, and if they had not been put on to the site they would have been put somewhere else where they would certainly have been in rateable occupation. The four tests stated by Mr. Rowe [4] in *Laing's* case at first instance, and approved by Tucker L.J.,[5] are not satisfied here, for there was no real occupation and it was too transient, having regard to the purpose of the buildings, the purpose for which they were on the site and the length of time that they were there.

These structures were in the nature of chattels. The test is not whether the contractors would get any benefit from the rates which they might be called on to pay, for, historically, rating is founded in obligation rather than payment for services. The original basis was a payment to the overseers to enable them to maintain the poor: *Regina* v. *St. Pancras Assessment Committee*.[6] The test is whether the structures have the necessary character of permanence and remain on the site indefinitely.

Maurice Lyell Q.C. and *Patrick Browne* for the valuation officer. The tribunal's findings of fact, which were amply justified by the evidence, show that each of the four elements stated by Mr. Rowe in *Laing's* case [7] which go to make up rateable occupation was satisfied here. In particular, it is clear that the finding that the occupation of the huts was not transitory was amply justified, for the period during which it was anticipated that the huts would be on the land was longer than that in *Laing's* case,[7] which was not held to be too transient, and, as in that case, the actual period of occupation was much longer.

The tribunal rightly held that it was bound by the decision in *Woodward* (*Valuation Officer*) v. *Brading & Blundell Ld.*,[8] for the huts were of the same type as those which were held to be rateable in that case. No doubt different considerations apply in deciding whether an object has become part of the land so as to be capable of rateable occupation and whether, for example, an object has become annexed to the land for the purpose of a contest between a mortgagee and a mortgagor; but in the end the question really is whether the structures have become part of the land for, as Lord Russell of Killowen said in *Westminster Corporation* v. *Southern Railway*,[9] it is in respect of land that persons are rated. A chattel may become part of the land if it is put on the land with the intention of using it as part of the

[4] [1948] 2 K.B. 116, 119.
[5] [1949] 1 K.B. 344, 350.
[6] (1877) 2 Q.B.D. 581.
[7] [1948] 2 K.B. 116, 119.
[8] (1951) 44 R. & I.T. 793.
[9] [1936] A.C. 511, 529.

land. As Blackburn J. said in *Holland* v. *Hodgson*,[10] stones lying loose in a builder's yard would be chattels, but when they are put into position as a dry stone wall they partake of the realty. The huts in question could not be removed intact. *City of Glasgow Assessor* v. *Gilmartin*[11] emphasized this in distinguishing the heritable subjects from the wooden shed on wheels which was removable intact and was not an heritable subject.

Unlike a chattel, which does not make the occupation of the land more beneficial, these huts enhanced the value of the occupation of the land. There was here a sufficient dedication of the site of the huts to make the occupation of the huts occupation of the land. No one could enjoy the land while the huts were standing on it. The occupier was enjoying the joint benefit of the land and each of the huts as one thing. The land and each hut taken together was something of which it could be predicated in the ordinary sense that it was occupied by the contractors. [Reference was also made to *Mitchell Bros. Ld.* v. *Worksop Union Assessment Committee*.[12]]

Squibb in reply. In *Holland* v. *Hodgson*[13] the rule was said to be whether the chattels were intended to be part of the land. The onus of proving that they had ceased to be chattels is on the valuation officer. If he is right it will mean that contractors' huts of this type will be continually changing from being chattels to being part of the land, for it is not disputed that when they are dismantled the sections are mere chattels. The huts are put on the various sites whilst the contractor is working there, that is, for a merely temporary period, and the contractor can only use the huts on that site for the purposes of, and as regulated by the terms of, the particular contract. In *City of Glasgow Assessor* v. *Gilmartin*[14] the site was in effect dedicated to the heritable structures and they were obviously intended to remain there indefinitely, but that is not so in the present case. The structures were intended to be removable and what was done here is distinguishable from the circumstances in *Laing's* case,[15] where it was found that if the contractors could not have erected the huts on that site they would have had to put them up somewhere else. The distinction between the contractor doing work on the site and using the land for the purposes of his business as a contractor is drawn in *Tyne Coal Co.* v. *Wallsend Overseers*.[16]

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[10] (1872) L.R. 7 C.P. 328, 335.

[11] 1920 S.C. 488.

[12] 1 Konst. 181.

[13] L.R. 7 C.P. 328, 335.

[14] 1920 S.C. 488.

[15] [1949] 1 K.B. 344.

[16] (1877) 46 L.J.M.C. 185.

In *Laing's* case [17] the huts were put up on part of the site which was separate from the part of the aerodrome where the work was being done. The contractors could have erected their plant and offices equally well on land rented from a third party, but it is inconceivable that a contractor would pay a rent to be allowed to go on to a part of the site where he had contracted to do work. Here the huts were on the part of the site where the work was being done; it cannot be said that a part was carved out and the contractors are rateable in respect of that part. If they are rateable, it must be in respect of the whole building site, but that has not been suggested. They had under the contract a mere licence to go on to any part of the site and to use it for the purposes of the contract. That is quite distinct from the use which they might make of their own depot or office. Here it was essential that they should be on the site of the building which they were erecting. They were using the site as "wayfarers" only, and, just as a circus proprietor goes away when the show is over, so the contractors dismantled the huts and left the site when the contract was completed. In those circumstances the huts lacked the necessary degree of permanence to be rateable.

In the second appeal, *London County Council* v. *Knight*, which was heard concurrently with the first, the same questions arose in relation to an hereditament described as "contractors' "huts" situate at Woodberry Down Estate, in the occupation of Henry Boot & Sons Ld., which the local valuation court for North-East London had directed should be added to the valuation list for the Stoke Newington rating area at a gross value of £49 and rateable value of £35.

EVERSHED M.R. I will ask Jenkins L.J. to deliver the first judgment.

JENKINS L.J. This is an appeal by the London County Council, on a case stated by the Lands Tribunal, from a decision of the tribunal to the effect "that a hereditament described as "'offices, stores and canteen, etc.,' situate at Walker Street "school site in the occupation of F. R. Hipperson & Son Ld." (referred to in the case as "the contractors") "should be added "to the valuation list for the Stepney Metropolitan Borough "rating area at a gross value of £35 and rateable value of £24."

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[17] [1949] 1 K.B. 344.

The structures to which I have referred were temporary wooden or corrugated iron buildings of the kind commonly found on building sites where work is in progress and used by the building contractors for the convenience of their men and the storage of their materials while the work is in progress. The contract under which the building operations here in question were carried out was dated March 30, 1950, and the contract was for erecting a school on the Walker Street school site.

The matters in dispute in the present appeal are somewhat ancient history. [His Lordship referred to the facts, and continued:] Nevertheless, the question is, no doubt, one of some general importance to building owners and to contractors; probably of more importance to the former, for presumably any liability to rates which the contractor might be under would, as a rule, be passed on to the building owner as part of the cost of the work.

[His Lordship referred to the facts found by the Lands Tribunal, and continued:] The points to notice as to the character of these structures are that two of the four were huts of the kind known as "wooden sectional huts," while the two others had corrugated iron sides and roofs. The general foreman's and timekeeper's office had a wood floor on sleepers, the sleepers resting on the ground so that the building stood on the ground by its own weight. The cement store had a "concrete floor," and I understand that to mean that it was standing on the concrete floor and not actually attached to it. The canteen and store was "standing on an old roadway or playground." That, again, I think means standing by its own weight; and the standing of the plumbers' store is similarly described.

I should next refer to some of the provisions of the contract of March 30, 1950, as these were relied on by Mr. Squibb, for the council. [His Lordship referred to paragraph 2 of the case stated, which is set out above, and continued:] The question that we have to decide is whether, upon those facts, the contractors were in rateable occupation of the four temporary structures which I have described. It is, as I understand it, common ground that the four prerequisites of rateable occupation are those which were stated by Mr. Rowe in *John Laing & Son Ld.* v. *Kingswood Assessment Committee*,[1] and approved by the Court of Appeal [2] in that case: first, there must be actual possession by the alleged occupier; secondly, possession must be exclusive for the particular purposes of the occupier; thirdly, the possession must be of some use or value or benefit to the possessor; and fourthly, the possession must not be for too transient a period.

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[1] [1948] 2 K.B. 116, 119; 64 T.L.R. 407; [1948] 1 All E.R. 943.

[2] [1949] 1 K.B. 344; 65 T.L.R. 80; [1949] 1 All E.R. 224.

Mr. Lyell, for the valuation officer, submits that these four conditions have been satisfied in the present case. Mr. Squibb, for the council, disputes that, and he says, as I understand his argument, that the quality of the use to which a builder puts structures of this nature is not such as to amount to rateable occupation: it is of too special and transient a character. Then he says that the occupation is not exclusive, that the true position of the contractors is that they are mere licensees of the building owners to come on the site and execute the work they have contracted to carry out, and that these temporary erections, whether for the convenience of their staff or for the protection of their stores from the weather, are mere incidents of the carrying out of the contracted work. Further, he says that in any case these temporary structures are not part of the hereditament so as to make the occupation of them rateable occupation, inasmuch as they are (as I have termed them several times) temporary structures, having no permanent attachment to the soil, brought on the site in sections as and when some contract secured by the contractors makes their use necessary or desirable, and allowed to stand there so long as they are wanted for the purpose of that particular contract and then taken to pieces and removed to another site.

The question is whether, on any of these grounds, Mr. Squibb's objection to the effect that the disputed structures fail to satisfy the four requisites of rateability formulated by Mr. Rowe, and the further requisite that the occupation, to be rateable, must be occupation of a hereditament as distinct from a chattel, has been established.

We were referred to a number of cases on the general principles of rating applicable to this case, and also to cases in which those principles have been applied in relation to transactions more or less similar or analogous to the transaction in the present case, that is to say, cases in which contractors have erected temporary buildings for the convenience of their workmen or the storage of their goods in the carrying out of building or constructional work. For the general principles we were first referred to *Regina*

v. *St. Pancras Assessment Committee*,[3] and we were referred to that case for certain observations of Lush J. He said[4]: "It is "not easy to give an accurate and exhaustive definition of the "word 'occupier.' Occupation includes possession as its primary "element, but it also includes something more. Legal possession "does not of itself constitute an occupation. The owner of a "vacant house is in possession, and may maintain trespass "against any one who invades it, but as long as he leaves it "vacant he is not rateable for it as an occupier. If, however, he "furnishes it, and keeps it ready for habitation whenever he "pleases to go to it, he is an occupier, though he may not reside "in it one day in a year. . . Another element, however, besides "actual possession of the land, is necessary to constitute the kind "of occupation which the Act contemplates, and that is perman-"ence. An itinerant showman who erects a temporary structure "for his performances, may be in exclusive actual possession, and "may, with strict grammatical propriety, be said to occupy the "ground on which his structure is placed, but it is clear that he "is not such an occupier as the statute intends. As the poor-rate "is not made day by day or week by week, but for months in "advance, it would be absurd to hold that a person, who comes "into a parish with the intention to remain there a few days or a "week only, incurs a liability to maintain the poor for the next "six months. Thus a transient, temporary holding of land is not "enough to make the holding rateable. It must be an occupation "which has in it the character of permanence; a holding as a "settler not as a wayfarer."

The actual decision in that case concerned the rateability of an advertiser who, under licence, had erected an advertisement hoarding upon a certain hereditament; and it was held that there was no rateability, on the ground that the alleged occupier only had a licence to make this use of the premises, and that this was not sufficient to create rateability. So far as the case proceeded on that ground it cannot now be regarded as good law, in view, in particular, of *Westminster Corporation* v. *Southern Railway*,[5] to which I am about to refer. It is interesting to note, before I leave *Regina* v. *St. Pancras Assessment Committee*,[6] that Lush J. seems also to have based his decision on the further ground that nothing had been so annexed to the soil as to become a fixture.

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[3] (1877) 2 Q.B.D. 581.

[4] Ibid. 588.

[5] [1936] A.C. 511; 52 T.L.R. 541; [1936] 2 All E.R. 322.

[6] 2 Q.B.D. 581.

We were referred to the group of cases of *Westminster Corporation* v. *Southern Railway*,[7] and other allied cases. The question in that group of cases was whether bookstalls, a chemist's shop, kiosks, hairdressing saloons and other tenements within the area of the railway station had been " so let out as to be " capable of separate assessment " within the proviso to section 1 (3) of the Railways (Valuation for Rating) Act, 1930, and, therefore, not to be " railway hereditaments " within section 1 (3) but to be rateable under the general law of rating. We were referred to the following passage from the speech of Lord Russell of Killowen[8]: " In the next place I would make a few general observations upon rateable occupation. Subject to special enactments, " people are rated as occupiers of land, land being understood as " including not only the surface of the earth but all strata above " or below. The occupier, not the land, is rateable; but, the " occupier is rateable in respect of the land which he occupies. " Occupation, however, is not synonymous with legal possession: " the owner of an empty house has the legal possession, but he is " not in rateable occupation. Rateable occupation, however, must " include actual possession, and it must have some degree of " permanence: a mere temporary holding of land will not constitute rateable occupation. Where there is no rival claimant to " the occupancy, no difficulty can arise; but in certain cases there " may be a rival occupancy in some person who, to some extent, " may have occupancy rights over the premises. The question " in every such case must be one of fact—namely, whose position " in relation to occupation is paramount, and whose position in " relation to occupation is subordinate; but, in my opinion, the " question must be considered and answered in regard to the " position and rights of the parties in respect of the premises in " question, and in regard to the purpose of the occupation of those " premises. In other words, in the present case, the question " must be, not who is in paramount occupation of the station, " within whose confines the premises in question are situate, but " who is in paramount occupation of the particular premises in " question."

Lord Russell referred to certain powers of control exercised by the railway company over the activities of the various occupants of kiosks and so forth in the station precinct, and said[9]: " In truth the effect of the alleged control upon the

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[7] [1936] A.C. 511.
[8] Ibid. 529.
[9] Ibid. 532.

"question of rateable occupation must depend upon the facts in "every case; and in my opinion in each case the degree of the "control must be examined, and the examination must be "directed to the extent to which its exercise would interfere "with the enjoyment by the occupant of the premises in his "possession for the purposes for which he occupies them, or "would be inconsistent with his enjoyment of them to the "substantial exclusion of all other persons."

Later, Lord Russell said[10]: "In my opinion the crucial "question must always be what in fact is the occupation in "respect of which someone is alleged to be rateable, and it is "immaterial whether the title to occupy is attributable to a lease, "a licence, or an easement."

Before I leave this case there is a passage in the speech of Lord Wright M.R. to which I should refer. The premises with respect to which the question whether they had been "so let out "as to be capable of separate assessment" arose included in particular bookstalls and kiosks, or small shops apparently resting on the floor of the station by their own weight but connected by pipes and by the electrical connexion provided by the company with parts of the station, and the observations of Lord Wright M.R. to which I am about to refer are, I think, relevant in the present case to Mr. Squibb's argument to the effect that the temporary structures in the present case, inasmuch as they were merely resting on the ground by their own weight and were in no way permanently attached to it, were chattels and not part of the hereditament. Lord Wright M.R., who described the bookstall in the same sense as the description which I have read from the statement of facts in the case, said[11]: "On the description of the "facts and the agreement in reference to W. H. Smith & Son's "bookstalls which I have given earlier in this opinion, I think that "on principle they are so let out as to be capable of separate "assessment and ought to be excluded from the roll as not being "railway hereditaments. They are premises of considerable size, "occupying definite areas which they have occupied for a long "time without being moved. It is true that the railway company "reserve power to change the sites, but the evidence is that they "do not ever, or only at very rare intervals, exercise that power; "while the stalls remain in a particular site, the site is occupied "by W. H. Smith & Son. In *Electric Telegraph Co.* v. *Salford*

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[10] [1936] A.C. 511, 533.

[11] Ibid. 559.

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" *Overseers*,[12] where the subject of assessment consisted of " telegraph posts of which the landowners could direct removal at " will, it was held that there was exclusive occupation of the " soil by the posts so long as they were not required to be moved. " There was sufficient permanence to constitute rateability. That " principle applies in my opinion to the bookstalls. They and the " sites on which they stand are in fact beneficially occupied, like " any of the other shops or premises in the station: it would be " unfair that they should escape being rated while the other " premises are rated."

Next we were referred to the first of the cases which have been discussed in which the alleged hereditament consisted of a temporary structure erected by a contractor for his convenience in carrying out works. That is *Mitchell Bros. Ld.* v. *Worksop Union Assessment Committee*,[13] decided by the Divisional Court. The headnote to that case is: " Contractors for the construction of " a railway had placed upon certain lands, by agreement with the " owners or occupiers of those lands, certain temporary structures " or huts for the accommodation of their workmen. The structures were capable of being readily removed without damage to " the ground; they had been in their present position for more " than a year when a rate was made upon them. It was admitted " that if the structures were rateable the contractors were in " occupation of them:—*Held*, that the contractors had been " rightly rated in respect of the structures." The case stated shows that " it was contended by the appellants," who were the contractors, " that the premises were not rateable; first, because " the said structures were chattels," with other reasons to which I need not refer. In argument for the union Mr. Ellison said [14]: " These structures are rateable. They are not in the nature of " chattels; but even if they were chattels, they must be taken " into account in fixing the value of the hereditament on which " they stand."

Lord Alverstone C.J., who delivered, in effect, the judgment of the court, as the other two judges merely concurred, said [15]: " There is a distinct admission in the case by the appellants at " quarter sessions that, if the premises were rateable, they were " in occupation of them; therefore it is clear that the only point " they intended to raise was that, by reason of the removability " of the structures, they were not liable to be rated. . . . The

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[12] (1855) 11 Ex. 181.

[13] (1904) 1 Konst. 181; 21 T.L.R. 156.

[14] 1 Konst. 181, 185.

[15] Ibid. 185.

"law of the matter is clear," and he went on to say: "If there "is no exclusive occupation, but a mere licence to use, there is "no liability to pay rates"; and he referred to some authorities for that proposition, which, if it means that actual exclusive occupation is not rateable if it arises from a mere licence to use, can no longer be regarded as sound. Lord Alverstone C.J. continued: "But if there is exclusive occupation, however it may be "described, there is rateability. . . . A man is none the less an "occupier of premises because he has a right to pull down a "structure that is upon them. The quarter sessions should have "decided that Messrs. Mitchell Bros. were rateable in respect "of these premises; and I am of opinion that the appeal should "be allowed." The structures there in question were made of wood and were supported, apparently, by wooden stakes driven into the ground, upon which cross-pieces were nailed, and that foundation having been made, wooden uprights were nailed to it and the structure was then boarded in by fastening boards to those uprights. They were capable of being readily removed by the contractors during the progress of works or on the completion of works, without damage to the ground. It is, however, fair to say that they seem to have been premises of a more elaborate and permanent character than those in the present case, and that they were in fact designed for persons working for the contractors on a railway to live in. One of the structures had brick chimney breasts, which is an added feature tending to show a permanent character. However, that case does go this length, that where a contractor erects a building supported on posts in the ground and of a kind that can readily be removed, and uses it for housing his workpeople on a particular site so long as it is necessary or desirable to do so having regard to the state of his operations, then he is in rateable occupation of the structure, notwithstanding the fact that it is not his intention to keep it permanently erected on that particular site, but to take it down and remove it when it is no longer needed or when the exigencies of the work or of other contracts require its erection elsewhere.

I come next to the more recent case of *John Laing & Son Ld.* v. *Kingswood Assessment Committee.*[16] In that case building contractors had entered into a contract with the Secretary of State for Air to carry out very extensive works involving the strengthening, widening and lengthening of a runway upon a certain aerodrome, the preparation of landing grounds, and the demolition of buildings. The work was carried out under a contract dated June 21, 1946, and the date originally contemplated for its completion was 11 months, but in fact it was not completed for more than two years. For the purposes of this work John Laing & Son Ld. erected, on a part of the site handed over to them, as I understand, for that purpose, a large number of buildings and erections. I think that the main office building was already in existence and was handed over to them for use during the period of the contract, but they erected[17] "offices for the technical staff, the clerk of works and the field "engineers, a central time office, changing rooms and first aid "room, a foreman's office, garages, two weighbridge huts, a "workmen's canteen, a carpenters' shop, a transport hut, "batching and mixing plants, bases for concrete mixers, loading "sheds for concrete mixers, and loading ramps and platforms "for concrete mixers." I have read that list of items because it shows, and in considering the effect of this case one must remember it, that the works there in question were of a very much more extensive and complicated character, and the necessary preparations for them were on a far larger scale than anything that occurred in the present case. One should also note from that enumeration that the structures included a number of items which were not in themselves capable of "occupation" in the ordinary sense, such things as bases for concrete mixers, loading ramps, and platforms. The Divisional Court held that John Laing & Son Ld. were in rateable occupation of the temporary structures in question. In the course of his judgment Lord Goddard C.J. said[18]: "It seems to me that the contractor is "none the less occupying that land, occupying it as a licensee, "and occupying it for the purposes of carrying on his business, "thereby acquiring a beneficial occupation, because if he did not "occupy that land, he would have had to occupy some other "land, when, it would be admitted, he would have a beneficial "occupation. Here he certainly gets a beneficial occupation, "because he is enabled, by reason of his occupation, to carry "out the contract which he is intended to execute. . . . It may "be that the result of this decision, if it goes higher and is "upheld, will be that the rating authorities will claim to include "in their valuation lists hereditaments which hitherto have not "been included, on the ground that there is an occupation by "building contractors or builders of the land on which the

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[16] [1948] 2 K.B. 116.

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[17] [1948] 2 K.B. 116, 117.

[18] Ibid. 122.

"buildings are being constructed. It has always to be borne in "mind that it has been pointed out that the occupation must "be something more than a mere transient or purely temporary "occupation. The illustration has been given of the showman's "van, which comes on to land for a short period of a day or two, "or a week. It is said it would be absurd to make the showman "responsible for maintaining the poor in the parish for six "months when he has only been entertaining the poor in the "parish perhaps for two nights. . . ." He added, on the question of transience, "I say nothing about that, because each case must "depend on its own facts, but in this case the building has "occupied a very considerable period. I do not know whether "it is yet finished, but, at any rate, the building seems to have "been going on for two years."

I should next refer to the same case of *John Laing & Son Ld.* v. *Kingswood Assessment Committee* in the Court of Appeal.[19] Tucker L.J., after stating some of the facts, said[20]: "I may say at this point that the whole of this case is stated on "the assumption, as I read it, that these hereditaments are "rateable hereditaments. There is nothing in the case which "would entitle us to draw any distinction between any one of "them, except in so far as any distinction can be obtained from "the contract. What I mean is that it may be open in other "cases of a similar nature to argue that some of these buildings "or erections, or what I may call for convenience hereditaments, "are of such a nature that, whatever their occupation, they are "not capable of being rated. But no point is taken in this case "with regard to that. Nothing that I am deciding can be quoted "as an authority for the proposition that anything which answers "the description of some of these places or erections is, as a "matter of law, in all the circumstances, rateable." The Lord Justice then stated the four necessary ingredients of rateable occupation submitted by Mr. Rowe, to which I have already referred. He then referred in detail to the terms of the particular contract, and for present purposes the material feature of that part of the case consists in the extensive and stringent powers of supervision given to a superintending officer who was the representative of the Air Ministry. Those powers were certainly no less stringent and extensive than the powers conferred on the council or the architect in the present case. Tucker L.J. said[21]: "It is said by Mr. Williams that the very extensive

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[19] [1949] 1 K.B. 344.

[20] Ibid. 350.

[21] Ibid. 353.

"powers conferred upon the superintending officer are such "that the contractors cannot be regarded as being in exclusive "occupation of this hereditament. He seeks to distinguish "this case on its facts from the *Southern Railway* case.[22]" Then he cited at some length from the *Southern Railway* case[22] and he said[23]: "Those are the general principles "which we have to endeavour to apply to the facts of this "particular case. We have to ascertain what is the quality "of the occupation. If the contractors are occupying these "hereditaments for the purposes and the sole purposes of their "business, and if the measure of control retained by the Ministry "is not such as to alter the character and quality of their "occupation, then, in my view, they are in rateable occupation. "I think it has been rightly stressed that what one has to "determine is the quality of the occupation of the premises. "The measure of control by the Ministry in carrying out the "contract is a different thing from a control interfering with "the exclusive occupation of the hereditament. On reading the "conditions in this contract, and comparing it with the *Southern* "*Railway* case[24] and the principles there enunciated, the con-"clusion I have arrived at is that the Ministry had not in this "case such control as to render the occupation of the contractors "an occupation which is not rateable. In other words, I think "the real control exercised by the Ministry was a control with "regard to the performance of the contract and not a control "which interfered with the exclusive occupation of these heredita-"ments for the purposes of their work by the contractors." Asquith L.J. expressed his agreement,[25] I myself delivered a short concurring judgment,[25] and in the result the appeal was dismissed. Leaving on one side for the moment further authorities bearing on the question whether the temporary structures in this case were chattels and not part of the hereditament, those are all the authorities to which it is necessary to refer.

In the light of them I now return to the four requisites of rateable occupation as stated by Mr. Rowe[26] and approved by this court in the *Laing* case.[27] First there must be actual possession by the alleged occupier. On the facts of this case it seems to me that this condition is clearly satisfied. Quoad each of these temporary structures, I have no doubt that the contractors did have actual possession of them. The general foreman's and timekeeper's office was used for storing papers and for carrying out such paper work as it was necessary to do on the site. The cement store was not used for accommodating people but was used for storing the contractors' cement, and inasmuch as they did store cement there, in my judgment they were in actual occupation of that structure as well. The canteen and store, as I understand the facts, was also in the exclusive occupation of the contractors and used, I take it, as a place in which the men could eat their meals if so minded and could obtain hot water. The plumbers' store, like the cement store, was in the actual possession of the contractors inasmuch as they used it for storing plumbers' materials.

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[22] [1936] A.C. 511.
[23] [1949] 1 K.B. 344, 356.
[24] [1936] A.C. 511.
[25] [1949] 1 K.B. 344, 357.
[26] [1948] 2 K.B. 116, 119.
[27] [1949] 1 K.B. 344, 350.

Next, was the possession exclusive for the particular purposes of the contractors? In my judgment the answer to that question again must be yes. It is true that the architect had certain rights of access and it is also true according to the case, though we have not been referred to any express warrant for it in the contract, that the clerk of works could demand admittance to the huts at any time, but the huts were kept locked by the contractors and he could only enter by obtaining admittance from the foreman or some other employee who had the keys. In my view, the rights of access which were reserved to the council or the architect or the clerk of works were certainly no more extensive than those which existed in the *Laing* case [28] and were held by this court not to be sufficient to prevent the occupation from being exclusive. I should add that it is immaterial that the form of the contract here was that the contractors should be given the use of the site for the purpose of erecting the buildings, as distinct from being put in occupation or possession of the site. The form of words here used suggests a mere licence, but, as is shown from the passages I have quoted from the speech of Lord Russell in the *Southern Railway* case,[29] the determining factor is actual de facto occupation and it matters not whether that occupation is the result of a licence or of a tenancy or other form of agreement.

Next, the possession must be of some use or value or benefit to the possessor. That condition seems to me, on the authority of the *Laing* case,[30] also to be satisfied here, as the possession or occupation of these temporary structures was of undoubted benefit

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[28] [1949] 1 K.B. 344.
[29] [1936] A.C. 511, 529.
[30] [1949] 1 K.B. 344.

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and undoubted value to the contractors for the purposes of the contract upon which they were engaged.

Finally, possession must not be for too transient a period. In my view there was in this case a sufficient degree of permanence. In the *Laing* case[30] the period originally contemplated for the performance of the contract was 11 months, and by the time that the case came to these courts the period had been extended to a matter of two years or more. In the present case 12 months was the anticipated period and the structures in question remained on the site for a matter of 18 months (and in one case a little more) from the date when they were originally put up. In my view it is not possible to distinguish the *Laing* case[30] on the ground that here the structures were on the premises for a shorter period. I think that a period of a year, as originally contemplated, which in the end extended to some 18 months, provides the necessary degree of permanence. In any case, I agree with Mr. Lyell's submission that the question whether the necessary element of permanence exists must be one of fact and degree, and, the Lands Tribunal having found that a sufficient degree of permanence did exist, that, prima facie at all events, is not a decision with which this court should interfere.

Mr. Squibb has submitted, in effect, that these structures are of too trifling and transitory a character to be proper subjects of rateable occupation. He has also relied on the passage which I have read from the judgment of Tucker L.J. in the *Laing* case,[31] in which he pointed out that the court had not been invited to draw any distinction between the various buildings as regards their rateable character. Mr. Squibb said, and said rightly, that this leaves it open to him to contend that the buildings in this case were not capable of rateable occupation; but it must be borne in mind that, as appears from my citations from the report of the *Laing* case in the King's Bench Division,[32] the structures there included things which could not in the ordinary literal sense be "occupied" at all, such things as ramps and platforms for machinery. I do not think that Tucker L.J., in saying what he did about no distinction being drawn between the various kinds of erections in that case, should be taken as saying that such erections as huts designed for actual occupation, either by people or by goods, would not be in their nature rateable, or that one such hut could be distinguished from another merely on the ground of its size. I think that that would be introducing an undesirable refinement into this branch of the law. It is true, as I have said, that the buildings with which the *Laing* case [33] was concerned were of a more elaborate and extensive character; but they did include some huts or temporary buildings of a general character and use resembling the simpler and perhaps rather smaller erections in the present case. In my view, apart from the question (with which the *Laing* case [33] did not deal) whether these huts were in the nature of chattels as distinct from being part of the hereditament consisting of the structure itself and the area of land supporting it, this case is really governed by the *Laing* case.[33]

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[30] [1949] 1 K.B. 344.

[31] Ibid. 350.

[32] [1948] 2 K.B. 116, 117.

Finally, I turn to Mr. Squibb's submission that the erections here are in their nature chattels. It will be remembered that the general foreman's and timekeeper's office was erected on sleepers laid on the ground to which a wooden floor was nailed or otherwise secured. It may be said, therefore, to have rested on the ground or on the sleepers between itself and the ground by its own weight, as distinct from having foundations or other members embedded in the ground to which it was attached. The cement store had a concrete floor, and I am prepared to assume that it was simply standing upon that floor as distinct from being bolted or otherwise attached to it. The canteen store and the plumbers' store are both described in the case as standing on an old roadway or playground site. It would appear, therefore, that they also were resting upon the ground simply by their own weight. It is, therefore, necessary to consider whether, having regard to the absence of any physical attachment of those erections to the ground, they should be regarded after erection on the site as having the character of chattels unconnected with the land, in which case I understand Mr. Lyell to admit that their occupation would not be a rateable occupation.

On this part of the case Mr. Lyell referred us to *Holland* v. *Hodgson*.[34] The question there was whether certain machinery formed part of the freehold in a contest between the mortgagees of the premises in which the machinery was installed and the trustee of a deed of arrangement entered into by the owner for the benefit of his creditor. I think that should be mentioned because, in my view, the degree of attachment to the land necessary to make a structure such as those here under consideration part of a rateable hereditament is not necessarily the same as the degree of attachment necessary to make some object or erection part of the freehold in a contest between a mortgagee of the premises and a trustee in bankruptcy, or a trustee for the benefit of creditors, or the mortgagor. Mr. Lyell referred us to this case for certain general observations made by Blackburn J.[35]: "There is no doubt "that the general maxim of the law is, that what is annexed to "the land becomes part of the land; but it is very difficult, if not "impossible, to say with precision what constitutes an annexation "sufficient for this purpose. It is a question which must depend "on the circumstances of each case, and mainly on two circum-"stances, as indicating the intention, viz., the degree of "annexation and the object of the annexation. When the article "in question is no further attached to the land than by its own "weight it is generally to be considered a mere chattel; see "*Wiltshear* v. *Cottrell*,[36] and the cases there cited. But even in "such a case, if the intention is apparent to make the articles "part of the land, they do become part of the land: see "*D'Eyncourt* v. *Gregory*.[37] Thus blocks of stone placed one "on the top of another without any mortar or cement for the "purpose of forming a dry stone wall would become part of the "land, though the same stones, if deposited in a builder's yard "and for convenience sake stacked on the top of each other in the "form of a wall, would remain chattels. On the other hand, an "article may be very firmly fixed to the land, and yet the "circumstances may be such as to show that it was never "intended to be part of the land, and then it does not become "part of the land. The anchor of a large ship must be very "firmly fixed in the ground in order to bear the strain of the "cable, yet no one could suppose that it became part of the "land, even though it should chance that the shipowner was also "the owner of the fee of the spot where the anchor was dropped. ". . . Perhaps the true rule is, that articles not otherwise "attached to the land than by their own weight are not to be "considered as part of the land, unless the circumstances are "such as to show that they were intended to be part of the land, "the onus of showing that they were so intended lying on those "who assert that they have ceased to be chattels, and that, on "the contrary, an article which is affixed to the land even "slightly is to be considered as part of the land, unless the "circumstances are such as to show that it was intended all

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[33] [1949] 1 K.B. 344.

[34] (1872) L.R. 7 C.P. 328.

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[35] L.R. 7 C.P. 328, 334.

[36] (1853) 1 E. & B. 674; 22 L.J. Q.B. 177.

[37] (1866) L.R. 3 Eq. 382.

"along to continue a chattel, the onus lying on those who "contend that it is a chattel." According to that general statement of the law, the circumstance here that the various erections rested on the land only by their own weight would not be conclusive in favour of the view that they retained the character of chattels; but it would be a circumstance tending to support that view which, as Blackburn J. thought, would have to be displaced by the parties asserting the contrary. To that limited extent this case is an authority in Mr. Squibb's favour. But as I have said, I am not satisfied that precisely the same considerations necessarily apply in determining whether something on land is included in the security of a mortgagee of land and the question, which is the question here material, whether something on land forms part of a hereditament for the purposes of rateable occupation.

The case most nearly in point to which we were referred on that actual question is the Scottish case of *City of Glasgow Assessor* v. *Gilmartin*.[38] I say it is most nearly in point because it dealt with the very question which we have to decide, although being a Scottish case it decided that question with reference to the Scottish law as to what constitutes a heritable subject. Therefore, it cannot be regarded as an actual authority in the present case. Nevertheless, it seems to me to be of considerable persuasive force. According to the headnote the facts were these: "The tenant of a piece of ground placed on it two sheds "as bothies for his employees and as storehouses. The sheds "consisted of frames to which were bolted sheets of corrugated "iron. One shed rested against the brick wall of an adjoining "tenement, which formed one side of it; the other shed was "entirely detached. The framework of one shed rested by its "own weight upon bricks which were slightly sunk into the "ground; the framework of the other rested upon wooden sleepers "lying upon the surface of the soil. Both sheds were so con"structed that they could be taken to pieces and re-erected, and "one had in fact formerly been erected elsewhere. The tenant "had also placed upon the ground a wooden shed which he used "as his office. It was constructed to move on wheels, and had "been brought to the ground on its wheels, but the wheels had "then been removed and it rested on sleepers placed on the "ground. The wheels, however, were preserved, and could be "replaced at any moment, if it was desired to move the shed

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[38] 1920 S.C. 488.

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"elsewhere." It was held "(1) that the corrugated iron sheds "were heritable subjects and fell to be entered in the valuation "roll under section 4 of the Lands Valuation (Scotland) Amendment Act, 1895, as 'erections' made by the lessee; and (2) that "the wooden shed was not a heritable subject, and, accordingly, "did not fall to be entered in the valuation roll." Lord Salvesen in the course of his judgment said[39]: "The truth is that, while "the two structures in question can be taken to pieces and re-"erected, they certainly cannot be removed as whole subjects. "It is just in that respect that they differ from the structure C" —that was the one which was equipped with wheels—"which "was brought on its own wheels to the site. . . . In my opinion, "a structure which is designed for removal from place to place, "and which can be removed as a whole from place to place, is "not a heritable subject. The structure in question is simply a "glorified or enlarged roadman's hut, which we know is expressly "designed for the purpose of being moved along the road from "place to place while operations are going on. Such a movable structure seems to me to partake of the nature of "movable property and not of heritable property. I do not "think it makes any difference that here, for the purposes of "convenience, the wheels have been removed from the structure "since 1913, for we are told that they remain upon the premises "and could be fixed to the structure, with a view to its removal, "if circumstances so required. On these grounds I am of opinion "that, quoad structure C, the committee have reached a right "conclusion, and that, as regards structures A and B, they have "reached an erroneous conclusion, and that the valuation roll "must be corrected accordingly." Then Lord Mackenzie said[40]: "As regards the structure A, I think there is sufficient to bring "that within the law as it has been explained in previous cases. "The corrugated sheets are placed on only three sides of a framework, and the brick wall of the adjacent tenement is used as the "fourth side—the structure in fact is adapted so as to be built into "the house next to it. Each upright frame sits on brick, and "the bricks are embedded in the earth. There is no doubt that "there is a coating of cement upon the floor, although I do not "attach much importance to that. As regards the structure B, "what influences me is that it is apparent, from the finding of "the committee, that the building would have to be dissolved "before it could be removed. In order to erect it in its present

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[39] 1920 S.C. 488, 494.

[40] Ibid. 495.

"site a firm of joiners were employed. It had previously occupied "another site, and they took the roof off in two pieces and the "sides in four pieces, and the parts so taken to pieces were "bolted up again on the present site. I think that a building "of that character is properly described as heritable in its "nature." Lord Cullen said towards the end of his judgment[41]: "It is a building," that is, building B, "of the kind to which "the rule accessorium sequitur principale is generally applied. "The ordinary type of house rests in situ mainly by its own "weight, although it is quite true that for greater security the "foundations go below the surface. Where, however, such a "building can and does rest on the ground securely by its own "weight, without foundations penetrating the surface, and the "ground on which it stands is more or less permanently "dedicated to the purpose of a site for it, the absence of such "foundations does not appear to me materially to affect the "question."

That case, of course, as I have said, turned on the law of Scotland as to the nature of heritable subjects, but it would seem that for the purpose of making a structure a heritable subject, a degree of attachment to the land comparable to that necessary under English law to make such a structure part of the freehold would be required. The Lords of Session were all of opinion that structures without actual attachment to the land and closely comparable to those in the present case were nevertheless heritable subjects. In my view that decision, the reasoning of which, if I may respectfully say so, appeals to me as sound, is of great persuasive force in the present case. One must add to that the passage to which I have already referred from the speech of Lord Wright M.R. in the *Southern Railway* case.[42] The structures here in question, although resting on the soil simply by their own weight, were not independent chattels in the sense that they could be brought upon the site in the condition in which they were when erected and removed from the site at will still in that condition. As I understand the facts, these structures were brought upon the site in pieces, which pieces no doubt while they remained separate from each other were chattels. They were then built up or erected on the site, thus for the first time assuming the form of huts or sheds, call them what you will, capable of occupation on the site in the ordinary sense, that is to say, capable of accommodating people or stores.

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[41] 1920 S.C. 488, 496.

[42] [1936] A.C. 511, 559.

To remove them from the site it would be necessary to dismantle the structures so that they would lose the essential character which they bore when erected on the site, that is to say, the character of huts or sheds, and return to their previous form of disjecta membra, pieces of board or planks and corrugated iron and so forth which nobody could occupy in the ordinary sense at all. Each of them was thus a structure which could only exist as such for so long as it remained assembled on the site and resting by its own weight on the site.

Having regard to the reasoning in *City of Glasgow Assessor* v. *Gilmartin*,[43] and also to the observations of Lord Wright M.R. in the *Southern Railway* case,[44] in my opinion this was enough to make these structures for rating purposes part of the hereditament. They were set up on the hereditament in the way I have described with a view to the better enjoyment of the hereditament, that is to say, the area of land upon which they were erected. Their presence on the land was not merely transient as the presence might be of some chattel such as a caravan on wheels which could be removed in one piece at any time. In intention they were to remain on the site for a period of some 12 months during the performance of the contract, and in actual fact they remained on the site for a matter of six months longer than that. In my view there was nothing to distinguish them in principle from such things as bookstalls and kiosks in the *Southern Railway* case[44] which, though resting on the land only by their own weight, were nevertheless clearly regarded by Lord Wright M.R., and, I think, by the other Law Lords, as constituting with the land upon which they rested a hereditament the occupation of which, if it fulfilled other requirements, was rateable occupation. Accordingly, I cannot accept Mr. Squibb's submission to the effect that the occupation of these structures is not rateable because it is the occupation merely of chattels. These, in my view, were not chattels standing upon the land; they were structures which, while they remained on the land, were for purposes of rating—and what I am saying applies simply to rating and to nothing else—properly regarded as part of the hereditament. The requisites of rateable occupation deducible from the authorities have been in my judgment fulfilled in all other respects. In my view this appeal fails and should be dismissed.

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[43] 1920 S.C. 488.

[44] [1936] A.C. 511, 559.

ROMER L.J. I am entirely of the same opinion and am in agreement with the conclusions which Jenkins L.J. has expressed and with the grounds upon which those conclusions are based. There is, therefore, very little which I wish to add.

The first contention of the council before the Lands Tribunal was that the huts were chattels of such a nature that they were not capable of being rated. That contention was indeed the primary contention which was urged on their behalf before us by Mr. Squibb. It seems to me that unless they can make that contention good this appeal inevitably fails. The reason why I say that is because in my opinion every one of the four considerations which Mr. Rowe formulated in his argument in *Laing's* case,[45] and which were accepted as correct by this court,[46] militates against the view that the contractors are free from liability to rates in respect of these hereditaments. The first is that there must be actual occupation. As to that Mr. Squibb submitted that having regard to the nature of this property it cannot be occupied in a rateable sense by anybody at all. I think the answer to that is that the huts and structures were clearly being occupied by the contractors and they were occupying them for the purposes that they had in view. That occupation was tantamount to an occupation of the land on which the structures rested.

The second consideration is that the occupation must be exclusive for the particular purposes of the possessor. Assuming that there was occupation so as to satisfy the first consideration, I think it cannot be doubted, having regard to the whole circumstances, that the occupation of the contractors was exclusive.

Thirdly, the possession must be of some value or benefit to the possessor. In *Laing's* case,[47] which was in many respects similar, as Jenkins L.J. has pointed out, Lord Goddard C.J. said [48] that the contractors in that case were occupying the structures for their benefit in the sense that their occupation facilitated the execution of the contract on which they were engaged. I think that that consideration applies precisely to the present case.

Fourthly, and finally, the possession must not be too transient. As to that the relevant clause, which is clause 16 in the conditions which are contained in the specification, provided for completion within 12 months from the day of commencement of work. As may well be imagined, the work was not in fact completed within that 12 months. The structures continued to exist on the site for some 18 to 20 months in all. When one finds that the period of 11 months, which was the relevant period in *Laing's* case,[49] was regarded as not lending the character of transience to the structures which were erected in that case, then it would follow that the 12 months which was contemplated here leads to the same result. Further than that, as Jenkins L.J. has already pointed out, the question of transience is primarily one of fact, and the tribunal here obviously accepted the contention of the valuation officer that the occupation of the hereditament was sufficiently permanent to give rise to rateable occupation. It cannot be doubted that there was evidence from which the tribunal could arrive at that conclusion, and in my view that conclusion should, therefore, be maintained.

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[45] [1948] 2 K.B. 116, 119.
[46] [1949] 1 K.B. 344, 350.
[47] [1948] 2 K.B. 116.
[48] Ibid. 122.

Finally comes the question which was debated more than any other before us, namely, whether these structures are mere chattels or form part of the land for rating purposes. It is clear that in their component parts and before they are put together they may be regarded as chattels. But that is not the point: the point is whether after they have been assembled and turned into complete structures they remain chattels or whether their character is then changed. In my judgment, agreeing as I do with all that Jenkins L.J. has said on this subject, the character was changed and the structures, having regard to the manner in which they were put together, the time it was intended that they should remain there and all other relevant factors, lost their character of mere chattels and became sufficiently adherent to the land. Mr. Squibb said (and rightly said) that the onus was on the valuation officer to show that notwithstanding that they were originally chattels they had been converted into something else. In my opinion the valuation officer has successfully discharged that onus.

I would only add on this point that I think the judgment of Lord Salvesen in *Gilmartin's* case [50] carries the greatest conviction to one's mind and in substance covers the question which arises so far as this aspect of the appeal is concerned. I agree entirely, if I may respectfully say so, with what Lord Salvesen said on this subject; and applying his observations to the facts

[49] [1948] 2 K.B. 116.

[50] 1920 S.C. 488, 492.

of this case one is undoubtedly led to the conclusion, as I think, that the complete structures cannot be regarded as mere chattels. I, accordingly, agree that the appeal should be dismissed.

EVERSHED M.R. I am also of the same opinion. Out of respect for Mr. Squibb's argument I add a very few sentences of my own to what has fallen from my brothers. At the end of his reply Mr. Squibb contended (and I think rightly contended) that the proper conclusion on all the points which have been distinctly argued before us depended, in the end, on an answer to the question: Why are the contractors on this site? To that question Mr. Squibb's answer was: they are there merely as wayfarers, borrowing the word of Lush J.,[51] and are, therefore, not rateable. I take as the premise and foundation for what follows two sentences from the judgment of Lord Russell in the *Southern Railway* case,[52] which has been already read. He said [53]: "The "occupier, not the land, is rateable; but, the occupier is rateable "in respect of the land which he occupies"; and [54]: "In my "opinion the crucial question must always be, what in fact is "the occupation in respect of which someone is alleged to be "rateable, and it is immaterial whether the title to occupy is "attributable to a lease, a licence, or an easement."

The single question which I have stated can, in my judgment, as regards each of the structures here in question, be properly analysed and expanded so as to take somewhat the following form: Has there been a sufficient dedication of the land as the site of the structure: is there sufficient annexation of the site by the structure, so that the contractors can fairly be said by means of the structure to be in actual, exclusive, and beneficial occupation of the land, that occupation not being of a merely transient and fleeting nature? The question in this, as in other cases, must always (at least substantially) be one of degree and fact according to the particular circumstances. Thus in *Mitchell's* case,[55] to which Jenkins L.J. referred, it is no doubt true that the structure there under consideration had elements of stability and permanence not to be found in these structures; but the Divisional Court in effect answered the question which I have formulated affirmatively, and that decision, given 50 years ago, has not, so far as I know, ever been questioned.

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[51] 2 Q.B.D. 581, 588.

[52] [1936] A.C. 511.

[53] Ibid. 529.

[54] Ibid. 533.

[55] 1 Konst. 181; 21 T.L.R. 156.

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On the other hand, as Jenkins L.J. has observed, a caravan or a structure mounted and movable as a whole on wheels would prima facie not be a subject-matter of rateable occupation. See, for example, the reasoning in the Scottish case, *City of Glasgow Assessor* v. *Gilmartin.*[56] In the present case the tribunal, in my view, was well entitled to regard the particular facts relating to the particular structures as not in substance distinguishable from the corresponding facts in the earlier decision before the tribunal of *Woodward* v. *Brading & Blundell Ld.*[57] We have been referred to that case, in which the tribunal found and concluded that the answer to the question which I have attempted to formulate should be an affirmative answer. I see no good reason for this court interfering with that decision. The result, in my judgment, is, as my brothers have indicated, that this appeal in *Wilkins's* case should be dismissed. And as I understand the other case, *Knight's* case, is not really distinguishable, that must also be the fate of that appeal.

Appeals dismissed with costs.
Leave to appeal to the House of Lords.

Solicitors: *J. G. Barr; Solicitor of Inland Revenue.*

E. D.

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[56] 1920 S.C. 488.

[57] (1951) 44 R. & I.T. 793.

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